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Supreme Court of the United States

OCTOBER TERM, 1994

W.R. GRACE & CO.-CONN.,

Petitioner,

—v.—

MARYLAND CASUALTY COMPANY, ROYAL INDEMNITY COMPANY and AETNA CASUALTY and SURETY COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner seeks a writ of certiorari to review a decision of the Second Circuit Court of Appeals. The questions presented are:

1. Whether the Second Circuit's expansion of diversity jurisdiction through adoption of a "collision of interests" test conflicts with this Court's limitations on federal diversity jurisdiction as set forth in *City of Indianapolis v. Chase National Bank,* 314 U.S. 63 (1941), thereby furthering both a split among the Circuits in the application of that decision and the unwarranted expansion of diversity jurisdiction by judicial interpretation.

2. Whether, on review of a summary judgment decision, in the absence of a factual record, the Second Circuit's determination of a disputed issue of material fact violated this Court's proscription against improper appellate fact-finding as expressed in *Icicle Seafoods, Inc. v. Worthington,* 475 U.S. 709 (1986), and *Singleton v. Wulff,* 428 U.S. 106 (1976).

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The parties to the proceedings are petitioner W.R. Grace & Co.-Conn. ("Grace") and appellee Maryland Casualty Company ("Maryland Casualty"), Royal Indemnity Company ("Royal"), and Aetna Casualty and Surety Company ("Aetna").*

Petitioner Grace is a corporation organized under the laws of Connecticut and is a wholly-owned subsidiary of W.R. Grace & Co. Grace's subsidiaries or partnerships, other than wholly-owned operations, are: A-O Grace Kaustik, Boodin Partnership, Carbon Dioxide Slurry Systems LP, Grace Ventures Partnership I & II, Healthcare Medical, Immunecare of Hollywood, Immunecare of Key West, Infusion Systems, New Bedford Infusioncare, Nippon Dearborn Kabushiki Kisha, North Suburban Dialysis, OB One & IVtoo, Palm Springs I.V. Care II, Paramount Coal Company, Pharmacy Direct, Primecare Home Health Services, P.T. Grace Specialty Chemicals Indonesia, Pursue Gas Processing and Petrochemical Company, Quality Home Care Services of Watertown, NY, Sleep Diagnostic Associates, Sisters of Charity Home Health Care, and VNA-NMC Homecare Partnership, Cormix Middle East, Emirates Chemical, Grace Cocoa Associates, L.P., Grace Offshore Turnkey, and Riggers Dialysatoren Produktion Thalheim GmbH & Co. K.G.

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* In addition, approximately fifteen insurance companies and more than thirty public entities appeared as *amici curiae* before the Second Circuit. *See* n.5, *infra.*

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OPINIONS BELOW

The opinion below was issued by the Second Circuit on May 16, 1994, and is reported at 23 F.3d 617. 3a - 28a.[1] The opinion and order of the United States District Court for the Southern District of New York from which that appeal was taken was entered on March 6, 1991, and is reported at 794 F. Supp. 1206. 29a - 85a.

JURISDICTION

The Second Circuit's mandate issued on July 22, 1994, following the denial of Grace's petition for a rehearing en banc. The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1332 - Diversity of citizenship; amount in controversy; costs

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between—
>
> > (1) citizens of different States . . . .
>
> * * *
>
> (c) For purposes of this section and section 1441 of this title—
>
> > (1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . .

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[1] Citations to the appendix to this petition appear in the form "_a" throughout this petition.

STATEMENT OF THE CASE

Grace seeks review of the Second Circuit Court of Appeals' ruling because that decision deviates entirely from this Court's precedents on controlling principles of law which prescribe the proper scope of federal diversity jurisdiction and the limitations on federal appellate fact-finding. In contravention of the "primary purpose" test in realignment cases established by this Court in *City of Indianapolis*, the Second Circuit relied on a less exacting "collision of interests" test and found that diversity jurisdiction existed in this case. In so doing, the Second Circuit joined the Seventh and Eighth Circuits in rejecting the reasoning of *City of Indianapolis*, more closely followed by the First, Third, Fifth, Sixth, Ninth and Eleventh Circuits.

Under the "primary purpose" test, the court determines the principal purpose or primary issue in the suit and then aligns the parties according to their position on that issue. Under the "collision of interests" test, realignment of the parties is appropriate only if there are no actual conflicts between the parties, regardless of whether the controversy is related to the primary matter in dispute.

The Second Circuit's ruling calls attention not only to a split among the circuit courts of appeals regarding the proper test for determining the existence of diversity jurisdiction, but to the increasing uncertainty in the standards for establishing diversity jurisdiction in multiparty actions at a time when recent statistics indicate that diversity cases account for nearly half of all civil trials in federal courts.[2] This Court's

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[2] Statistics from the Administrative Office of the United States Courts demonstrate the substantial impact of diversity cases on the civil trial calendar. On a national basis, insurance actions constitute the largest identifiable category of diversity contract actions for the 12-month period ending June 30, 1994. Indeed, during that same time period, 6,298 diversity insurance cases were filed compared to a total of 2,091 personal injury asbestos cases. Civil court calendars are becoming increasingly congested. In the Southern District of New York, for example, the

guidance is required in this important area of federal subject matter jurisdiction. The persistent and recurring nature of this issue and the need for uniform application of a test for resolving alignment in diversity cases can be effectively resolved only by the prompt action of this Court.

Grace also seeks review of the Second Circuit's decision in which the court reversed the district court's grant of partial summary judgment after engaging in improper fact-finding without a factual record before it. This Court has not hesitated to use the power of certiorari to correct such injustices caused by appellate courts which, upon reviewing a grant of summary judgment in a district court, determine a question of fact in violation of the "clearly erroneous" standard of review set forth in Fed. R. Civ. P. 52(a).

The Second Circuit exceeded its authority by deciding an ultimate factual issue that was not even raised in that court or in the district court below; was decided in the absence of a full evidentiary record; was based on insubstantial and inappropriate support; was inconsistent with prior judicial determinations of related claims and did not even attempt to reconcile the probability of inconsistent findings; and was decided without adequate consideration of and ultimately in contravention of applicable state law, and despite the fact that no party objected to the Circuit Court's own query as to whether a remand for the development of a factual record would be proper. The tremendous impact of that decision will be felt not only by Petitioner, but also by numerous litigants in the Second Circuit and elsewhere. This Court should not hesitate to exercise its supervisory powers over the federal appellate judiciary to correct such an error.

A. The Proceedings Below

In October 1983, Maryland Casualty, which had provided Grace with comprehensive general liability insurance from

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percentage of civil cases over three years old has nearly doubled between 1988 and 1993.

1955 to 1973, commenced a declaratory judgment action against Grace and Continental Casualty Company ("CNA") in the United States District Court for the Southern District of New York, seeking a declaration of its rights and obligations to provide insurance coverage for asbestos-related claims. The suit was a "first-strike" or pre-emptive suit brought by Maryland Casualty in an effort to gain access to a federal forum for application of New York substantive insurance law to multi-million dollar coverage issues involving personal injury and property damage claims which Grace is facing on a nationwide basis.

In its complaint, Maryland Casualty alleged that the federal district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a), diversity of citizenship. At the time the lawsuit was filed, Maryland Casualty was a Maryland corporation with its principal place of business in Baltimore; Grace was a Connecticut corporation with its principal place of business in New York; CNA was incorporated in Illinois, with its principal place of business in Chicago. In July, 1984, Maryland Casualty moved for leave to amend its complaint to seek declaratory relief against Royal, Aetna, and General Insurance Company of America ("General"), all of which sold comprehensive general liability insurance between 1950 and 1968 to companies acquired by Grace.[3]

Grace opposed Maryland Casualty's motion for leave to amend on the grounds that the addition of Aetna and Royal as defendants would destroy diversity jurisdiction. Royal was a Delaware corporation with its principal place of business in New York; Aetna was a Connecticut corporation with its principal place of business in Hartford, Connecticut.

In its opposition to Maryland Casualty's motion, Grace observed that although Royal and Aetna were nominally defendants, their true interests in the lawsuit corresponded to

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[3] The companies acquired by Grace were manufacturers and distributors of products containing asbestos. Prior to 1963, Grace did not manufacture or distribute any asbestos-related products.

those of Maryland Casualty: all were adverse to Grace in seeking to deny Grace coverage for its claims to these insurers. Because their interests were identical, and inimical to Grace's interest, Grace urged that the defendant insurers properly be realigned as plaintiffs. Upon realignment, Grace, incorporated in Connecticut with its principal place of business in New York, would no longer be diverse from Aetna or Royal, and the federal court would be required to dismiss the matter for lack of subject matter jurisdiction.

In April, 1985, the district court granted Maryland Casualty leave to amend, while failing to address the issue of subject matter jurisdiction. In its amended complaint, filed in May, 1985, Maryland Casualty again alleged jurisdiction on the basis of diversity.

B. The District Court's Coverage Opinion

Grace, and companies it acquired, manufactured and sold building products containing asbestos, which were used to soundproof and fireproof buildings from the 1940s until the mid-1970s. Subsequently, lawsuits filed against Grace, and most other manufacturers and installers of building products containing asbestos, alleged bodily injury caused by these products and property damage resulting from the presence of asbestos-containing materials in buildings and sought the costs of the removal or containment of these products (the "underlying tort actions").

Grace sought to be indemnified for any liability it faced in the underlying tort actions by five insurance companies that sold it primary comprehensive general liability insurance: Maryland Casualty, CNA, Aetna, General, and Royal. The insurers either denied coverage or sent "reservation of rights" letters asserting that their policies did not provide coverage for the asbestos-related claims against Grace.

Following cross-motions for partial summary judgment, the district court, on March 6, 1991, issued an opinion in which

it determined, under New York law, the "trigger" of insurance coverage for claims of asbestos-related bodily injury and property damage. With respect to the trigger of coverage for bodily injury claims, the district court, relying on *American Home Products Corp. v. Liberty Mutual Insurance Co.*, 565 F. Supp. 1485 (S.D.N.Y. 1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984), held that "injury-in-fact" triggered coverage for asbestos-related bodily injury claims, and further held that there was an insufficient record of the time as to when such injury-in-fact occurred. 43a - 44a.

The district court then addressed the issue of trigger of coverage for asbestos-related property damage claims. Grace sought a "continuous" trigger of coverage, under which every environmental insurance policy in effect from installation to removal of the asbestos would provide coverage, while Maryland argued for a "manifestation" trigger, under which the "discovery" of property damage must occur during the policy period to trigger coverage. 61a. Relying on *American Motorist Insurance Co. v. Levolor Lorentzen, Inc.*, 1988 WL 112142 (D.N.J. 1988), *appeal dismissed*, 879 F.2d 1165 (3d Cir. 1989) (applying New York law), the district court held that New York would adopt the "discovery" trigger for property damage claims. 64a.

C. The Second Circuit's Decision

Grace thereafter filed a timely appeal on the issue of trigger of coverage. While the appeal was pending, and after two United States Courts of Appeals dismissed insurance coverage cases involving other parties for lack of subject matter jurisdiction on almost identical realignment issues,[4] Grace moved in the Second Circuit for an order vacating the district court's decision for lack of subject matter jurisdiction. The Second Circuit directed Grace to file briefs on the jurisdiction issue, and Grace complied.

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[4] *See United States Fidelity & Guar. Co. v. Thomas Solvent Co.*, 955 F.2d 1085 (6th Cir. 1992); *Employers Ins. of Wausau v. Crown Cork & Seal Co.*, 942 F.2d 862 (3d Cir. 1991).

On September 1, 1993, the Second Circuit issued its decision on Grace's appeal. In direct contravention of *City of Indianapolis*, the court held that, under a "collision of interests" test, diversity jurisdiction is satisfied as long as there is some "actual, substantial controversy, or a collision of interests" between the parties. 13a. The existence of a conflict among the insurance companies on issues other than the principal issue of whether Grace is entitled to insurance coverage "produced the required collision of interests to sustain diversity." 15a. In adopting the "collision of interests" test to resolve the realignment issue, the Second Circuit concluded that the "primary purpose" test "is not actually dictated by *Indianapolis*," and that subordinate controversies between the parties should be considered. In rejecting the primary purpose test, the court reasoned that "[b]ecause the insurers are of a single mind to escape liability for paying claims does not mean that they are not in conflict with one another." 15a. As a result of such reasoning, the court ruled "that actual and substantial controversies exist among the insurers and Grace to sustain diversity jurisdiction." 17a.

With respect to Grace's appeal on the trigger of coverage for asbestos-related property damage claims, the Second Circuit rejected the district court's "discovery" trigger and adopted an "injury-in-fact" trigger: a policy must respond if injury or damage takes place during the policy period, regardless of when property damage is discovered. 22a. However, rather than remand on the issue of when "injury-in-fact" occurs, and without an evidential record before it, the Second Circuit held that "[o]nce installed, the damage that asbestos inflicts is complete" and that any subsequent fiber release "concerns solely the health of those persons who breathe" the air. 26a. To emphasize its point, the court repeated that property damage occurs, in all cases, for all types of products containing asbestos, **only** upon installation. 26a.

The Second Circuit's "finding" of fact with respect to the timing of asbestos property damage was unsupported by any

evidence from the record on appeal, any allegations or evidence in the underlying tort actions, or any determinations of fact in the underlying tort actions. Moreover, no party, in either the district court or before the Second Circuit, had introduced any evidence with respect to the timing of the occurrence of property damage related to asbestos.

Grace and Royal both filed petitions for rehearing, suggestions for rehearing en banc, and, alternatively, motions for certifications to the New York Court of Appeals. In their petitions, Grace and Royal sought, *inter alia*, a remand to the district court for a factual hearing as to when the alleged asbestos property damage occurred in the underlying tort actions against Grace. In October 1993, the Clerk of the Court of the Second Circuit polled Maryland Casualty and Aetna to learn if they would object to a remand to the district court for a factual hearing to determine "whether the damages incurred at the time of asbestos installation in a building are ongoing." Neither party objected.

Numerous claimants in the underlying tort actions filed *amicus curiae* briefs urging rehearing.[5] They argued that the Second Circuit's "finding" that asbestos-related property damage occurs only upon installation was incorrect as a matter of fact and inconsistent with the rulings in the underlying tort actions which had already found that property damage was caused by actual asbestos fiber release, not mere installation.

In January 1994, the Second Circuit granted rehearing concerning the trigger of coverage ruling in its September 1993

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[5] The *amici* included the Attorneys General of thirty-one states, the District of Columbia, and the Northern Marianas Islands; the New York State School Board Association; the National School Board Association; Texas Governmental Subdivisions and Independent School Districts; additional insurance companies; and various private parties such as the Asbestos Claims Management Corporation, the certified class representative of all colleges and universities in the United States, and the certified class representatives of all primary and secondary school districts in the United States.

decision, and ordered rebriefing of that issue only. 88a - 89a. On May 16, 1994, however, the Second Circuit issued an amended Opinion that is essentially the same as the September 1993 decision, with some non-substantive editing. 3a - 28a. The court did not address, or even mention, **any** of the arguments raised by the parties or *amici* in their submissions on rehearing. Grace's petition for rehearing en banc was denied by the Second Circuit on July 15, 1994. 1a - 2a. This petition for certiorari to the Second Circuit was filed on October 13, 1994.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS SQUARELY WITH THIS COURT'S HOLDING IN *CITY OF INDIANAPOLIS* AND FURTHERS A DIRECT AND IRRECONCILABLE CONFLICT AMONG THE CIRCUITS REGARDING THE PROPER TEST FOR DETERMINING DIVERSITY JURISDICTION

This Court has granted certiorari frequently in cases in which a court of appeals has decided a federal question in a way that conflicts with applicable decisions of this Court. The Second Circuit, in applying the "collision of interests" test, has impermissibly expanded the scope of diversity jurisdiction and has, in effect, condoned the growing practice of "manufactured" diversity by those interests intent on adjudicating their state law claims in a federal forum. In so determining the realignment of the parties for purposes of diversity jurisdiction, the Second Circuit misinterpreted and misapplied Mr. Justice Frankfurter's "primary purpose" test announced by this Court in *City of Indianapolis* over fifty years ago. The "primary purpose" test, by which parties are aligned according to the "principal purpose of the suit," has been followed

as controlling precedent in the First, Third, Fifth, Sixth, Ninth and Eleventh Circuits."[6]

In addition to the Second Circuit, the Seventh and Eighth Circuits have also adopted the "collision of interests" or "actual conflicts" test between the parties,[7] such that a direct conflict has now developed among the circuit courts. The Second Circuit's decision conflicts directly with Courts of Appeals for the Third and Sixth Circuits which have expressly rejected the "collision of interests" test in insurance coverage cases and properly have followed the "primary purpose" test announced in *City of Indianapolis*.

This petition presents a critical issue that affects the proper scope of federal diversity jurisdiction. As multi-party complex litigation proliferates in the federal courts, the practice of diluting the "primary purpose test" of *City of Indianapolis* results in depriving state courts of their jurisdiction over such matters, and too easily leads to the manufacture of diversity jurisdiction and to the growing practice of forum shopping among the federal circuits. It is time for this Court to intercede to stop the expansion of federal diversity jurisdiction through the manipulation of the realignment of parties in order to create federal jurisdiction. That problem, as well as

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[6] *See, e.g., U.S.I. Properties Corp. v. M.D. Constr. Co.*, 860 F.2d 1, 4 (1st Cir. 1988), *cert. denied*, 490 U.S. 1065 (1989); *Employers Ins. of Wausau v. Crown Cork & Seal Co.*, 942 F.2d 862, 866 (3d Cir. 1991); *Zurn Indus., Inc. v. Acton Constr. Co.*, 847 F.2d 234, 237 (5th Cir. 1988); *Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173, 1178 (5th Cir. 1984); *Eikel v. States Marine Lines, Inc.*, 473 F.2d 959, 963 (5th Cir. 1973); *Indemnity Ins. Co. v. First Nat'l Bank at Winter Park, Fla.*, 351 F.2d 519, 522 (5th Cir. 1965); *United States Fidelity & Guar. Co. v. Thomas Solvent Co.*, 955 F.2d 1085, 1089 (6th Cir. 1992); *Continental Airlines v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1523 (9th Cir. 1987); *Dolch v. United Cal. Bank*, 702 F.2d 178, 181 (9th Cir. 1983); *Weller v. Navigator Marine, Inc.*, 737 F.2d 1547, 1548 (11th Cir. 1984).

[7] *See, e.g., American Motorists Ins. Co. v. Trane Co.*, 657 F.2d 146, 151 (7th Cir. 1981); *Universal Underwriters Ins. Co. v. Wagner*, 367 F.2d 866, 871 (8th Cir. 1966).

the conflict among the circuits and this Court on this question, which challenges the statutory limitations on the authority of Article III courts, will continue to recur without this Court's prompt intervention.

A. The Second Circuit's Decision Contravenes the "Primary Purpose" Test Set Forth in *City of Indianapolis*.

In *City of Indianapolis*, this Court established that when there is more than one controversy among the parties to a lawsuit, diversity jurisdiction must be based upon an alignment of the parties according to the "principal purpose of the suit" and the "primary and controlling matter in dispute." Mr. Justice Frankfurter, writing for the Court, held that:

> To sustain diversity jurisdiction there must exist an "actual," . . . "substantial," . . . controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side . . . . Whether the necessary "collision of interests" . . . exists, is therefore not to be determined by mechanical rules. **It must be ascertained from the "principal purpose of the suit . . . and the primary and controlling matter in dispute"** . . . .

314 U.S. at 69 (emphasis added) (citations omitted). Thus, a court should identify the "dominating controversy" in the case, to which "[e]verything else . . . is incidental," in determining whether the parties are aligned properly. *Id.* at 69, 72. The existence of incidental claims in addition to the dominating controversy will not change the result.

This Court further held that the determination of diversity jurisdiction must not be left to the parties:

> Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determinations of who are plaintiffs and who defendants. It is our duty, as it is that

> of the lower federal courts, to "look beyond the pleadings and arrange the parties according to their sides in the dispute."

City of Indianapolis, 314 U.S. at 69 (quoting *Dawson v. Columbia Ave. Sav. Fund, S.D. Title & T. Co.*, 197 U.S. 178, 180 (1905)).

In this case, the primary and controlling matter in dispute was accurately stated by the district court: "This case, like many others across the country, involves **a dispute between an insured and insurers** concerning coverage for underlying asbestos personal injury and property damages cases." 30a (emphasis added; footnote omitted).[8] All of the insurance companies, whether nominally denominated as plaintiff or defendant, share the primary goal of avoiding liability to Grace on its asbestos claims.[9] Any claims that the insurance companies have against each other arise only if, and when, they are found liable to Grace. Under the "principal purpose" test adopted by this Court in *City of Indianapolis*, the insurance companies all should be aligned against Grace, with the resultant absence of diversity jurisdiction.

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[8] Similarly, after outlining twelve forms of relief that Maryland Casualty sought solely against Grace, the district court stated, "Maryland Casualty further requests relief in the form of a judgment ordering Aetna, Royal and General, **to the extent that Grace is able to establish that those insurers afforded responsive coverage**, to reimburse Maryland Casualty . . . ." 36a (emphasis added).

[9] The Second Circuit failed to recognize this fact because it determined, erroneously, that Continental "**never** has been adverse to Grace . . . ." 15a (emphasis added). To the contrary, Grace and Continental had adverse interests as a result of Continental's reservation of rights letter. Also, Continental sued Grace in another court in connection with asbestos insurance coverage issues. *Continental Casualty Co. v. W.R. Grace & Co.*, No. 90-C-1255 (N.D. Ill. filed Mar. 5, 1990). Moreover, even if Continental were properly aligned with Grace, Grace is not diverse from Aetna and Royal, insurance companies that were opposed to Grace on all issues in this litigation.

The Second Circuit's "collision of interests" test cannot be reconciled with this Court's holding in *City of Indianapolis*. A careful reading of Mr. Justice Frankfurter's "governing principles" on realignment demonstrates that a court must look only to conflicts in the "principal purpose of the suit" and the "primary and controlling matter in dispute," 314 U.S. at 69, and ignore conflicts that are wholly contingent to or derivative of the primary claim. *See generally* Note, *Janus Was Not A God of Justice: Realignment of Parties in Diversity Jurisdiction,* 68 N.Y.U. L. Rev. 1072 (1993).

Grace's demand for insurance coverage is the principal purpose of the suit and the primary and controlling matter in dispute. The rights and obligations of the carriers to each other are both contingent and derivative and arise only if a court determines that Grace is entitled to coverage. Any incidental disputes between the carriers exist only to the extent that there is an obligation to provide insurance coverage to Grace, and are completely dependent upon the primary coverage dispute at issue. As to that issue, all of the carriers oppose Grace.

The Second Circuit's adoption of a "collision of interests" test impermissibly expands the scope of diversity jurisdiction. As even the Second Circuit concedes, its "collision of interest" test is "broader" and "more flexible" than the "primary purpose" test. 13a-14a. This Court has made clear, however, in *City of Indianapolis* and elsewhere, that a broad and flexible test is undesirable. Federal courts are courts of limited jurisdiction, empowered to hear cases only as provided for under Article III of the Constitution and congressional enactments pursuant thereto. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986); *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 173-80 (1803).

This Court repeatedly has cautioned that federal courts must guard against the expansion of diversity jurisdiction by judicial interpretation: "Due regard for the rightful independence of state governments, which should actuate federal

courts, requires that they **scrupulously** confine their own jurisdiction to the precise limits which the statute has defined." *City of Indianapolis*, 314 U.S. at 77 (citation omitted) (emphasis added). *See also Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985); *American Fire & Casualties Co. v. Finn*, 341 U.S. 6, 17-18 (1951).

Even fifty years ago, this Court recognized the growing burden placed upon the federal courts by diversity jurisdiction:

> The dominant note in the successive enactments of Congress relating to diversity jurisdiction is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of "business that intrinsically belongs to the state courts" in order to keep them free for their distinctive federal business.

City of Indianapolis, 314 U.S. at 76.

B. The Second Circuit's Adoption of the "Collision of Interests" Test Furthers a Direct and Irreconcilable Conflict Among the Circuit Courts of Appeals Regarding the Appropriate Test for Diversity Jurisdiction.

Six circuit courts of appeals have adopted the *City of Indianapolis* "primary purpose" test for determining diversity jurisdiction, two of them in the same insurance declaratory judgment context as here. *See* n.6, *supra*. Two other circuit courts of appeals, in addition to the Second Circuit, have adopted the "collision of interests" test. *American Motorists Ins. Co. v. Trane Co.*, 657 F.2d 146, 151 (7th Cir. 1981);[10] *Universal Underwriters Ins. Co. v. Wagner*, 367 F.2d 866, 871 (8th Cir. 1966).

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[10] Even the Seventh Circuit has turned away from a strict "collision of interests" test since deciding *Trane*. *See Truck Ins. Exch. v. Ashland Oil, Inc.*, 951 F.2d 787, 788 (7th Cir. 1992); *Fidelity & Deposit Co. of Md. v. City of Sheboygan Falls*, 713 F.2d 1261, 1267 (7th Cir. 1983).

Notably, the two circuit courts of appeals that have expressly rejected the "collision of interests" test have done so in insurance coverage cases that are virtually identical to this case. In *Thomas Solvent*, for example, the Sixth Circuit held that issues of contribution among insurance companies—the very issue which the Second Circuit used to support its "collision of interests" test—were ancillary to the ultimate issue of indemnification and could not sustain diversity jurisdiction:

> The issue of contribution can only be addressed after the court has determined which of the various insurers have a duty to indemnify particular [policyholders]. Moreover, if the insurers are held not to owe a duty to indemnify any of the [policyholders], then the issue of contribution is moot.

955 F.2d at 1090-91. The court emphasized that the determination of diversity must not be left to the parties themselves:

> [I]t is well established that: "**[t]he courts, not the parties, are responsible for aligning the parties according to their interests in the litigation.** If the interests of a party named as a defendant coincide with those of the plaintiff in relation to the purpose of the lawsuit, the named defendant must be realigned as a plaintiff for jurisdictional purposes."

Id. at 1089 (emphasis in original) (*quoting Continental Airlines*, 819 F.2d at 1523).

Similarly, in *Crown Cork*, the Third Circuit held that the principal issue was "simply whether the insurers have obligations to defend and indemnify" the policyholder. 942 F.2d at 866. Although the insurance companies had advanced different theories of liability, and some of them had asserted cross-claims and counterclaims for contribution, "they are joined in their common goal of avoiding obligations" to the policyholder. *Id.* On this basis, the Third Circuit affirmed

the dismissal for lack of subject matter diversity jurisdiction. *Id.* at 866-67.[11]

The Second Circuit's adoption of a "collision of interests" test furthers the split of authority among the circuit courts of appeals on this fundamental issue of federal diversity jurisdiction. The Second Circuit's misguided contention that its decision does not conflict with the "purpose" of *City of Indianapolis* requires this Court to clarify the appropriate diversity test by granting a writ of certiorari.

II. THE SECOND CIRCUIT'S DECISION VIOLATES THIS COURT'S PROSCRIPTION AGAINST IMPROPER APPELLATE FACT-FINDING.

This Court has granted certiorari numerous times to rectify errors created by the courts of appeals when they engaged in impermissible appellate fact-finding. In this case, the Second Circuit's conduct was particularly egregious because, in reviewing the district court's summary judgment decision, the Second Circuit determined a disputed issue of material fact

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[11] The Second Circuit distinguished *Thomas Solvent* and *Crown Cork* on the ground that CNA was not adverse to Grace in this action, while in those cases, "every insurer was antagonistic to the insured." 15a. As discussed at note 9, *supra*, this argument is factually incorrect. Furthermore, the decision erroneously disregards that, apart from CNA, Aetna and Royal are adverse to Grace, and their presence is sufficient to destroy diversity. *See* Note, 68 N.Y.U. L. Rev. at 1117-18 n.287; *see also Continental Airlines*, 819 F.2d at 1523, in which the Ninth Circuit applied the "principal purpose" test in a sua sponte consideration of subject matter jurisdiction in an action arising out of an accident involving one of the plaintiff's aircraft. Citing *City of Indianapolis*, the Ninth Circuit realigned one of the plaintiffs, the California supplier, as a defendant.

Moreover, the Second Circuit's citation of opinions from the First and Fifth Circuits as authority for the "collision of interests" test reflects a misreading of those cases. Both *U.S.I. Properties Corp.*, 860 F.2d 1, and *Zurn Industries, Inc.*, 847 F.2d 234, support application of the "primary purpose" test.

which (1) was not raised in that Court or in the district court, (2) was decided in the absence of any evidentiary record, (3) was based on insubstantial and inappropriate support, (4) was inconsistent with prior judicial determinations of the underlying asbestos-related property damage claims against Grace and did not even attempt to reconcile the probability of inconsistent findings, and (5) was decided without adequate consideration of, and ultimately in contravention of applicable New York state law.

The Second Circuit's decision summarily adjudicated a factual issue that is critical to, and is established in each of the underlying tort actions, namely, when the asbestos-related injuries took place. The Second Circuit's decision effectively eliminated the insured's ability to support its coverage claims with evidence established through the underlying tort claims themselves. The decision also impermissibly expanded the role of summary judgment determinations, a tool that is likely to become an increasingly desirable and efficient method of disposing of insurance coverage cases, which are frequently litigated in federal diversity actions, corresponding to the rapidly growing number of state-based toxic tort claims for injuries to persons and property. The Second Circuit's flawed decision likely will serve as the basis for future rulings in other jurisdictions. *See Stevens v. City of Cannon Beach*, ___ U.S. ___, 114 S. Ct. 1332, 1335-36 (1994) (Scalia, J., dissenting from denial of certiorari, noting unfairness of state court reliance on prior case which itself lacked an evidentiary foundation). The potential impact of the Court's decision, not only on the settlements and judgments reached in the underlying tort actions related to this case, but also on the multitude of coverage disputes over asbestos-related property damage pending throughout the country, cannot be overstated.

The time is ripe to remind and admonish federal appellate courts that the determination of factual issues that would otherwise preclude summary judgment is the proper function of the district court, not the court of appeals. This Court

should exercise its supervisory powers and grant certiorari in this matter to set forth the appropriate limits of federal appellate jurisdiction in this regard.

A. The Second Circuit's Disputed Finding of Fact Was Erroneous On At Least Five Grounds.

Circuit courts are permitted to review *de novo* only questions of law. *Pierce v. Underwood,* 487 U.S. 552, 558 (1988); *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 402-04 (1990). The Second Circuit recited the appropriate limitation on its function in this case:

> In reviewing the grant of summary judgment, substantive insurance law will determine which facts are material to the parties' dispute, and "[o]nly disputes over facts that might affect the outcome of the suit" will bar summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Because the adoption of a coverage trigger is a question of substantive insurance law, we review the magistrate judge's grant of such relief *de novo*.

17a. This express recognition of the standards governing review of a summary judgment determination was meaningless, however, since the Second Circuit nevertheless exceeded its role and engaged in *de novo* fact-finding.

The limited issue that the district court certified to the Second Circuit pursuant to Fed. R. Civ. P. 54(b) involved the propriety of the summary judgment determination below that the proper trigger of insurance coverage for asbestos-related property damage claims was manifestation or discovery of an injury, as opposed to injury-in-fact. That was the only issue for the Second Circuit to decide as a matter of law, and the Second Circuit decided that injury-in-fact, not discovery, was the trigger for property damage claims.

The Second Circuit erred, however, when it went on to decide a subsidiary and critical issue of fact without a factual

record. Rather than announcing the proper legal standard and remanding to the district court for development of an appropriate factual record to which the legal standard should be applied, the Second Circuit proceeded to determine the ultimate fact issue of **when** injury-in-fact occurs in connection with asbestos-related property damage claims, finding that such injury takes place only upon installation of asbestos in a building. That factual conclusion, although couched as a matter of law, was erroneous.

1. The disputed factual issue was not raised in the district court or in the court of appeals.

This Court repeatedly has refused to allow the federal courts of appeals to usurp the role of either fact-finder or principal fact reviewer.[12] "[A]ppellate courts must constantly have in mind that their function is not to decide factual issues de novo." *Anderson v. Bessemer City,* 470 U.S. 564, 573 (1985) (quoting *Zenith Radio Corp v. Hazeltine Research, Inc.,* 395 U.S. 100, 123 (1969)).[13]

In *Singleton v. Wulff,* 428 U.S. 106 (1976), this Court explained the rule that a federal appellate court generally does not consider an issue not determined below:

> [This rule] is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of

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[12] *See, e.g., Maine v. Tyler,* 477 U.S. 131, 145 n.17 (1986); *Anderson v. Bessemer City,* 470 U.S. 564, 573-76 (1985); *Inwood Laboratories v. Ives Laboratories,* 456 U.S. 844, 857-58 (1982); *Zenith Radio Corp. v. Hazeltine Research,* 395 U.S. 100, 123 (1969).

[13] As stated in the Advisory Committee Notes to Fed. R. Civ. P. 52(a), "[t]o permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority."

> issues upon which they have had no opportunity to introduce evidence.

Id. at 120 (quoting *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)). *Singleton* concluded that the parties must have the opportunity to introduce both evidence and legal arguments in support of their cause, and that the petitioner was justified in not presenting those arguments to the Court of Appeals and in assuming, rather, that he would have the opportunity to do so in the district court should the Court of Appeals agree that he had standing to pursue his claim. *Id.*

Likewise, in *Icicle Seafoods, Inc. v. Worthington,* 475 U.S. 709 (1986), this Court vacated and remanded the Ninth Circuit's decision because it contained inappropriate fact-finding. In setting forth the only options that had been available to the appellate court, the Supreme Court stated:

> **If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings.** If it was of the view that the findings of the District Court were "clearly erroneous" within the meaning of Rule 52(a), it could have set them aside on that basis. If it believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment. **But it should not simply have made factual findings on its own.**

Id. at 714 (emphasis added). *See also Inwood Laboratories v. Ives Laboratories,* 456 U.S. 844, 857 n.19 (1982); *River Plate & Brazil Conferences v. Pressed Steel Car Co.,* 227 F.2d 60, 63 (2d Cir. 1955); *Carr v. Corning,* 182 F.2d 14, 21-22 (D.C. Cir. 1950).

Although there may be "circumstances in which a federal appellate court is justified in resolving an issue not passed on below," such as where "the proper resolution is beyond any

doubt" or where "injustice might otherwise result," *Singleton*, 428 U.S. at 121, courts must be mindful that the *Singleton* Court concluded that "injustice was more likely to be caused than avoided by deciding the issue without petitioner's having had an opportunity to be heard." *Id. Accord Fountain v. Filson*, 336 U.S. 681, 683 (1949).

2. The disputed factual issue was decided in the absence of a full evidentiary record.

Unfortunately for Grace, the *Singleton* Court's fear that injustice was more likely to result from a decision made without an opportunity to be heard was realized in this case. Throughout the proceedings in the district court and on the initial appeal to the Second Circuit, the parties debated the legal issue of what triggered property damage insurance coverage, discovery or injury-in-fact. Like the petitioner in *Singleton*, no party ever argued the subsidiary factual issue of when either discovery or injury-in-fact took place because everyone, including the district court, knew those issues were inappropriate on summary judgment.[14] In their submissions to the Second Circuit, mindful of the general rule that prohibits presentation on appeal of facts and issues that were not presented or considered below, *see, e.g., Singleton*, 428 U.S. 120, none of the parties submitted any evidence as to when injury-in-fact occurs. Rather, they sought remand to the district court so that the question could be supplemented with evidence, fully litigated, and decided in that tribunal.

To the parties' amazement and dismay, having acknowledged that a substantial question remained "concerning correct application of this trigger, one that depends upon the definition of property damage," 23a, and despite the fact-

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[14] Indeed, in addressing the injury-in-fact trigger for asbestos-related bodily injury claims coverage, the district court explicitly recognized differences among the Circuits on that issue and denied summary judgment, leaving it to the underlying cases to "address related factual issues concerning the injuries at issue." 43a - 44a.

intensive nature of such an inquiry, the Second Circuit proceeded to define, in the absence of a factual record, how and when asbestos injures a building, concluding that injury occurs upon installation of the asbestos. 24a - 25a. Grace and virtually every other party to the appeal, including more than forty *amici curiae*, formally requested a remand and opportunity to be heard, identifying for the Second Circuit in summary fashion the evidence developed by plaintiffs in the underlying tort actions that would be presented on remand in the district court, including the nature of the plaintiffs' underlying tort claims, expert testimony, and judicial decisions on those underlying claims that held that asbestos-related property damage can and does occur subsequent to installation of the asbestos.

3. The disputed factual finding was based on insubstantial and inappropriate support.

In the absence of a proper evidentiary record, what the Second Circuit was forced to rely upon to support its "installation only" finding was (1) the only known district court case to adopt an installation-only trigger for property damage insurance coverage, and (2) a partisan journal article prepared by insurance defense attorneys. 25a - 27a. The case, *Stonewall Insurance Co. v. National Gypsum Co.*, 86 Civ. 9671 (S.D.N.Y. May 27, 1992), *appeal pending*, No. 94-7082, [90a - 129a], is inappropriate support for the Second Circuit's conclusion for many reasons.[15] *Stonewall* confused the time at which

[15] *Stonewall* is poor authority because it is inconsistent with (1) that court's earlier characterization of the physical nature of asbestos property damage as happening when fibers are released, 109a - 110a, (2) its finding that "a continuous trigger theory is not incompatible with an injury in fact theory," 119a, n.15, and (3) an injury-in-fact trigger, which should allow a policyholder to prove, as an issue of fact, that property damage occurred during more than one particular policy period. In addition, *Stonewall* emphasizes the court's sharp departure from the established procedure for examining state law: the district court in *Stonewall* also failed to engage in the required analysis of New York law. See pp. 25-26, *infra*.

damages are fixed, which that court found to be installation, with the various times at which **property damage** can occur, which triggers coverage. Perhaps more significantly, the "installation only" finding in *Stonewall* was based on testimonial evidence in the record. 120a. No such evidence was before the appellate court in this case, and, as a result, no comfort can be drawn from the *Stonewall* decision.

With regard to the Arness/Eliason article,[16] Arness and Eliason are attorneys at Hogan & Harston who submitted an *amicus* brief to the Second Circuit on behalf of many of Grace's excess insurers, advocating the "discovery" trigger. However, even those authors take the position that, because of differences in products containing asbestos and building conditions "property damage coverage issues are extremely fact-oriented." *Id.* at 978-79.

4. The disputed factual finding was inconsistent with determinations made on the underlying tort claims and did not even attempt to reconcile the probability of inconsistent findings.

The inappropriateness of the Second Circuit's controversial factual finding is exacerbated by its failure to consider the evidence developed by the plaintiffs in the underlying tort actions against Grace and the nature of the asbestos-related liability imposed upon Grace in those cases. The Court's decision is, in fact, directly contrary to the evidence presented by plaintiffs in the underlying tort actions regarding the nature and timing of the alleged asbestos property damage—evidence that includes the underlying tort complaints and statements of the Environmental Protection Agency that were relied upon by the underlying tort plaintiffs—as well as the decisions in those cases that have ruled on the nature of asbestos property damage and the timing of that damage.

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[16] John P. Arness and Randall D. Eliason, *Insurance Coverage for "Property Damage" in Asbestos and Other Toxic Tort Cases*, 72 Va. L. Rev. 943 (1986).

The available record from the underlying tort actions confirms that, in the vast majority of cases involving buildings made with materials containing asbestos, the courts, including New York courts, require evidence of release of asbestos fibers as proof of property damage due to asbestos. Grace enumerated and discussed these cases extensively in its rehearing brief. The Second Circuit's contrary and arbitrary finding disregarded Grace's arguments, as well as the evidence presented by plaintiffs and relied on by the courts in the underlying tort actions.[17]

The Second Circuit's finding also violated the established principle of insurance law that coverage is dependent upon the nature of the underlying claim, not upon an independent determination of the claim in the coverage action. *See, e.g., Luria Bros. & Co. v. Alliance Assurance Co.*, 780 F.2d 1082, 1091 (2d Cir. 1986); *Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368, 1378 (E.D.N.Y. 1988). Concerned that policyholders not be placed in the untenable position of inconsistent rulings in the underlying tort and insurance coverage cases, courts have held that insurance companies can be bound by the judgments and settlements in the underlying cases. *See, e.g., Luria Bros.*, 780 F.2d at 1091; *Ridgeway v. Gulf Life Ins. Co.*, 578 F.2d 1026 (5th Cir. 1978); *American Indus. Underwriters Corp. v. Zurn Indus.*, 771 F. Supp. 690, 701 (W.D. Pa. 1991); *Uniroyal, Inc.*, 707 F. Supp. at 1378. The Second Circuit's decision undermines this established practice and

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[17] The anomaly between the Second Circuit's decision and Grace's liability in the underlying tort actions is made apparent by the decision in *MDU Resources Group v. W.R. Grace and Co.*, 14 F.3d 1274 (8th Cir.), *cert. denied*, 63 U.S.L.W. 3258 (1994). The Eighth Circuit held that the North Dakota statute of limitations did not begin to run until the property owner was aware that asbestos in the building posed an actual hazard. The court reasoned that "the injury for which asbestos plaintiffs are being recompensed is the contamination of their buildings and not the mere presence of asbestos." *Id.* at 1279. That decision cannot be reconciled with the Second Circuit's decision that equates injury only with "mere presence" of asbestos at installation.

creates the anomaly in which the coverage dispute is not logically linked to the underlying tort actions, but is a separate, independent action that neither reflects nor evaluates Grace's liability in the underlying tort actions.

5. The disputed factual finding was made without adequate consideration of, and ultimately in contravention of applicable New York state law.

The Second Circuit also failed to analyze *de novo* the district court's legal conclusions based on state law, contrary to this Court's instruction in *Salve Regina College v. Russell*, 499 U.S. 225, 233 (1991). The Second Circuit neither analyzed nor applied New York law to the trigger of coverage question. That analysis would have revealed that the court's finding was contrary to New York law, which instructs that the release of asbestos fibers occurring after installation can cause property damage. *See City of New York v. Keene Corp.*, No. 44559/84 (N.Y. Sup. Ct. Dec. 2, 1985), *aff'd*, 129 A.D.2d 1019, 513 N.Y.S. 2d 1004 (1st Dep't 1987). 141a - 149a. *See also 887 7th Ave. Associated Ltd. Partnership v. AAER Sprayed Installations, Inc.*, No. 50460 (N.Y. App. Div. 1st Dep't, Dec. 7, 1993).[18] 130a - 140a. This law was fully briefed

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[18] The Second Circuit's inattention to relevant New York law is exacerbated by the Court's failure to seek guidance from extensive, analogous case law from other courts, many of which have determined that asbestos property damage claims trigger insurance policies subsequent to installation. *See, e.g., Carey Canada, Inc. v. California Union Ins. Co.*, 748 F. Supp. 8 (D.D.C. 1990); *Owens-Illinois, Inc. v. United Ins. Co.*, 264 N.J. Super. 460, 625 A.2d 1 (App. Div. 1993); *Armstrong World Indus., Inc. v. Aetna Casualty & Sur. Co.*, 20 Cal. App. 4th 296, 26 Cal. Rptr. 2d 35 (1993), *review granted*, (Jan. 27, 1994). *See also United States Fidelity & Guar. Co. v. Wilken Insulation Co.*, 144 Ill. 2d 64, 578 N.E.2d 926 (1991); *Lac d'Amiante du Quebec, Ltee. v. American Home Assurance Co.*, 613 F. Supp. 1549 (D.N.J. 1985), *vacated on other grounds*, 864 F.2d 1033 (3d Cir. 1988). Grace itself has been a party to cases with such favorable holdings. *See, e.g., Dayton Indep. School Dist. v. National Gypsum Co.*, 682 F. Supp. 1403 (E.D. Tex. 1988), *rev'd on jurisdictional grounds sub nom. W.R. Grace & Co. v. Continental Casualty Co.*, 896 F.2d 865 (5th Cir. 1990).

by the parties and discussed in the district court opinion. 61a - 63a. However, the Second Circuit ignored it entirely,[19] abandoning the entire body of relevant New York law in favor of the *Stonewall* case, which also failed to give proper attention to New York law. See pp. 22-23 & n.15, *supra*.

The Second Circuit's result-oriented "finding" dramatically illustrates the need for this Court's intervention. This Court should insure the right of all parties to have a full and fair hearing, with facts to be decided on a fully-developed record. Given this Court's repeated proscriptions against appellate court usurpation of the fact-finding and fact-reviewing roles of district courts, the Second Circuit should not be permitted to dispense with those roles altogether and assume the position of both judge and jury.

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[19] The other New York cases cited by the Second Circuit, *Sturges Mfg. Co. v. Utica Mutual Ins. Co.*, 37 N.Y.2d 69, 332 N.E.2d 319, 371 N.Y.S.2d 444 (1975), and *Marine Midland Serv. Corp. v. Samuel Kosoff & Sons, Inc.*, 60 A.D.2d 767, 400 N.Y.S.2d 959 (4th Dep't 1977), address the question of **what** property is damaged by the installation of a defective component which may fail in the future but does not otherwise contaminate or physically damage the product or building into which it is incorporated. The issue in those cases was whether the "own product" exclusion applied, not **when** property damage occurred. The Second Circuit neglected to cite New York cases that have rejected an installation trigger. *See, e.g., Greenlee v. Sherman*, 142 A.D.2d 472, 536 N.Y.S.2d 877 (3d Dep't 1989).

CONCLUSION

Because the two issues presented here implicate the federal courts' subject matter jurisdiction under Article III of the Constitution, as well as those federal rules of procedure that were designed to safeguard litigants' Seventh Amendment rights, Grace respectfully requests that its petition for a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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On the Petition:

Robert G. Rose
Elizabeth J. Sher
Philip G. Barber

DATED: October 13, 1994

APPENDIX

BEST AVAILABLE COPY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 91-9322
FILED: MAY 19, 1994

AMENDED

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 16th day of May, one thousand nine hundred and ninety-four.

Present: HON. THOMAS J. MESKILL, *Chief Judge**
HON. J. EDWARD LUMBARD,
HON. RICHARD J. CARDAMONE,
Circuit Judges.

MARYLAND CASUALTY COMPANY,

Plaintiff-Appellee,

—v.—

W.R. GRACE AND COMPANY,

Defendant-Appellant,

CONTINENTAL CASUALTY COMPANY; AETNA CASUALTY & SURETY COMPANY and GENERAL INSURANCE COMPANY OF AMERICA,

Defendants,

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* After oral arguments but before the decision was rendered, Chief Judge Meskill stepped down as Chief Judge and is now a Senior Circuit Judge of the United States Court of Appeals for the Second Circuit.

ROYAL INDEMNITY COMPANY; AETNA CASUALTY and SURETY COMPANY,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment be and it hereby is reversed and the action remanded for further proceedings consistent with the opinion of this Court.

GEORGE LANGE III
George Lange III, Clerk

By: EDWARD J. GUARDARO
Edward J. Guardaro
Staff Attorney

ISSUED AS MANDATE ON 22 JULY 94

[AMENDED]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 11—August Term 1992

(Argued September 30, 1992

Decided September 1, 1993)

(Petition for Rehearing Granted January 11, 1994)

(Opinion Amended May 16, 1994)

Docket No. 91-9322

MARYLAND CASUALTY COMPANY,

Plaintiff-Appellee,

—v.—

W.R. GRACE AND COMPANY,

Defendant-Appellant,

CONTINENTAL CASUALTY COMPANY; AETNA CASUALTY & SURETY COMPANY and GENERAL INSURANCE COMPANY OF AMERICA,

Defendants,

ROYAL INDEMNITY COMPANY; AETNA CASUALTY AND SURETY COMPANY,

Defendants-Appellees.

Before:

MESKILL, *Chief Judge*,*
LUMBARD and CARDAMONE, *Circuit Judges*.

Asbestos products manufacturer appeals from the judgment of the United States District Court for the Southern District of New York (Bernikow, M.J.) holding that insurance coverage was triggered by building owners' discovery of asbestos hazard and granting summary judgment in favor of insurers. On appeal, we hold that (1) parties to this litigation should not be realigned to destroy diversity jurisdiction; and (2) insurance coverage is triggered by installation of asbestos in buildings.

Reversed and remanded.

RANDY PAAR, New York, New York (Jerold Oshinsky, Jordan Stanzler, Anderson Kill Olick & Oshinsky, P.C. New York, New York, of counsel), *for Defendant-Appellant W.R. Grace & Co.*

LAURA A. FOGGAN, Washington, D.C. (James P. Anasiewicz, Nancy J. Lemay, Wiley, Rein & Fielding, Washington, D.C., of counsel), *for Plaintiff-Appellee Maryland Casualty Company.*

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* After oral argument but before the decision was rendered, Chief Judge Meskill stepped down as Chief Judge and is now a Senior Circuit Judge of the United States Court of Appeals for the Second Circuit.

CARL J. PERNICONE, New York, New York (James P. Donovan, Robert L. Joyce, Wilson, Elser, Moskowitz, Edelman & Dicker, New York, New York, of counsel), *for Defendant-Appellee Royal Indemnity Company.*

JAMES E. ROCAP, III, Washington, D.C. (Jay L. Alexander, Miller, Cassidy, Larroca & Lewin, Washington, D.C.; Kaare Phillips, Grais & Phillips, New York, New York, of counsel), *for Defendant-Appellee Aetna Casualty and Surety Company.*

Edward M. Shaw, New York, New York (Stillman, Friedman & Shaw, P.C., New York, New York; William J. Bowman, Donald C. Brown, Jr., James P. Ruggeri, Hogan & Hartson, Washington, D.C., of counsel), *filed a brief on behalf of Hartford Accident & Indemnity Company and First State Insurance Company as Amici Curiae.*

R. Nicholas Gimbel, Philadelphia, Pennsylvania (Jill A. Douthett, Hoyle, Morris & Kerr, Philadelphia, Pennsylvania, of counsel), *filed a brief on behalf of National Gypsum Company as Amicus Curiae.*

Thomas J. Quinn, New York, New York (Eileen T. McCabe, Stephen T. Roberts, Mendes & Mount, New York, New York,

of counsel), *filed a brief on behalf of Rayment and London Market Companies as Amicus Curiae.*

Gerald V. Weigle, Jr., Cincinnati, Ohio (Stephen G. Schweller, Trudy Weiss Craig, Gregory A. Harrison, Dinsmore & Shohl, Cincinnati, Ohio; Marcia B. Golden, Boston, Massachusetts, of counsel), *filed a brief on behalf of Liberty Mutual Insurance Company as Amicus Curiae.*

Wilson M. Brown, III, Philadelphia, Pennsylvania (Paul H. Saint-Antoine, Drinker Biddle & Reath, Philadelphia, Pennsylvania; Peter N. Hillman, Susan J. Leskowitz, Chadbourne & Parke, New York, New York; James W. Christie, James A. Pabarue, Catherine C. Olanich, Clark, Ladner, Fortenbaugh & Young, Philadelphia, Pennsylvania; Philip C. Stahl, Katherine E. Rakowsky, Grippo & Elden, Chicago, Illinois, of counsel), *filed a brief on behalf of Lumbermens Mutual Casualty Company, American Motorists Insurance Company, American Manufacturers Mutual Insurance Company, Republic Insurance Company, Commercial Union Insurance Company, and Fireman's Fund Insurance Company as Amici Curiae.*

CARDAMONE, *Circuit Judge*:

The subject of this appeal is asbestos, a hazardous material found in public and private buildings everywhere. The presence of this substance has precipitated widespread litigation against its manufacturers, which have looked to their insurance carriers to defend and indemnify them. Before us on this appeal are a former manufacturer of asbestos products and the insurance companies that insured it. Here, the legal maxim *volenti non fit injuria*—that is no injury which is done with the injured party's consent—does not apply even though the owners had asbestos installed in their buildings. The maxim is inapt because neither the owners nor the individuals actually harmed by its carcinogenic effects consented to their injuries. The question before us instead centers on the bottom-line issue of who ultimately is liable in damages and litigation expenses to the owners of buildings contaminated with this mineral fiber. To resolve that question, we must make an initial legal determination as to when injury occurs to such a building.

BACKGROUND

We set forth first the background facts. W.R. Grace & Co.-Conn. (Grace), and companies it later acquired, manufactured and sold asbestos building products. These products were used for soundproofing and fireproofing buildings from the 1940s until 1973 when the U.S. Environmental Protection Agency (EPA) prohibited asbestos sales because inhalation of asbestos fibers caused serious health problems, particularly cancer. Grace then experienced a flood of litigation. As of May 31, 1989, 17,411 individual lawsuits had been filed against it for personal injuries caused by asbestos products, and building own-

ers had filed another 212 lawsuits for property damage caused by the presence of asbestos in their buildings and its subsequent removal or containment.

The instant litigation began as a declaratory judgment action in October 1983 in the United States District Court for the Southern District of New York. There the parties agreed, pursuant to 28 U.S.C. § 636(c) (1988 & Supp. III 1991), to refer the matter to U.S. Magistrate Judge Leonard Bernikow. Plaintiff Maryland Casualty Co. (Maryland)—which had sold comprehensive general liability insurance to Grace from 1955 to 1973—sued defendant Grace and its current primary insurer, defendant Continental Casualty Co. (Continental), to obtain a judicial declaration as to what obligation, if any, Maryland owed to defend or indemnify Grace in the thousands of underlying asbestos lawsuits. Jurisdiction was premised on diversity of citizenship. In April 1985 Maryland successfully added three other defendants, Royal Indemnity Co. (Royal), Aetna Casualty & Surety Co. (Aetna), and General Insurance Co. (General). Each of these defendants had sold primary insurance to asbestos manufacturers and distributors acquired by Grace between 1963 and 1967. Prior to 1963 Grace itself did not manufacture or distribute any asbestos products.

The insurance companies, with the exception of Continental, dispute when they insured Grace or its acquired companies. Continental has insured Grace from 1973 until the present; Maryland, Continental's immediate predecessor, insured Grace from 1955 to 1973. Grace contends that the following other insurance was also issued: Royal supposedly insured Zonolite Co., an asbestos manufacturer acquired by Grace in 1963, from 1950 to 1963; General is argued to have insured a Grace predecessor, Vermiculite Northwest Inc., between 1961 and 1966; and

Grace asserts Aetna insured three Grace predecessors, California Zonolite Co., Ari-Zonolite Co. and Western Mineral Products Co., from 1951 to 1970.

In June 1987 the parties, with the exception of Continental, cross-moved for summary judgment on 13 separate issues. Grace and Continental reached a settlement in July 1990. In a 75-page opinion dated March 1, 1991 the magistrate judge granted summary judgment on several matters, including the issue of insurance covering the property damage lawsuits. Most of the insurance policies sold to Grace and its predecessors had based coverage on an "occurrence" of property damage during their effective dates, except for Royal's policies that based coverage on "accidents." This distinction was not relevant, according to the magistrate judge, because "Royal agree[d] to be bound by whatever trigger of coverage the court endorse[d]."

Applying New York law, which the parties agree controls interpretation of all the insurance contracts, the magistrate judge adopted a "discovery trigger" for property damage coverage. Damage to property did not "occur," nor was insurance coverage triggered, the trial court explained, under the terms of the insurance policies until the building owner discovered, first, that there was asbestos in the building and, second, that it was hazardous. In nearly all the property damage cases building owners did not discover the dangers of asbestos until the early 1970s when the EPA and other federal agencies alerted the public to its hazardous nature.

The magistrate judge reaffirmed adoption of this trigger in orders dated July 8, 1991 and October 22, 1991. Application of the discovery trigger obligates only Continental, which as noted has insured Grace from 1973 to

the present date, and relieves all the earlier insurers of any liability. According to the trial court's October 22 order, "Grace presented no evidence of the discovery of property damage during Maryland's policy period," so Maryland was relieved of any coverage obligation even though it had insured Grace from 1955 to 1973. The financial consequences of this decision are substantial. According to Grace, as of early 1992 it had spent $184.6 million to settle claims or satisfy judgments in property damage asbestos lawsuits and $194.8 million to defend itself in such suits. Continental has exhausted the limits of its insurance coverage by paying $117 million in defense costs and $70 million in indemnity to Grace.

As a result of the March 1, 1991 decision, Royal and Maryland requested entry of final judgments on the property damage trigger issue. These judgments from which Grace subsequently filed this appeal, were entered pursuant to Fed. R. Civ. P. 54(b) on November 19, 1991. In addition to its 1990 settlement with Continental, Grace and Maryland reached a settlement in December 1991, but Maryland still is a party to the appeal because its liability to the other insurers depends upon the coverage trigger we ultimately adopt. During a February 1992 trial to determine whether Aetna had sold insurance to any Grace predecessors, Aetna also settled with both Grace and Maryland. The Aetna-Maryland settlement is contingent on the continued validity of a March 13, 1992 judgment of the magistrate judge dismissing all the other insurers' claims against Aetna.

On this appeal Grace challenges the adoption of the discovery trigger for property damage as a matter of New York law. Royal and Maryland advocate the discovery trigger because its adoption relieves them of liability in the underlying property damage lawsuits against Grace.

Grace also renews a challenge to subject matter jurisdiction that impacts, among other things, the Aetna-Maryland settlement. We discuss the jurisdiction issue first.

DISCUSSION

I Subject Matter Jurisdiction

Diversity jurisdiction requires that every plaintiff on one side of a civil action be a citizen of a different state than every defendant on the other side. *See* 28 U.S.C. § 1332; 1 James W. Moore et al., *Moore's Federal Practice* ¶ 0.71[5.-2] (2d ed. 1993). A corporation's citizenship is deemed to be that of the state in which it is incorporated and that of the state where it has its principal place of business. *See* 28 U.S.C. § 1332(c). As the action currently is aligned, plaintiff Maryland is a Maryland citizen. None of the defendants is a citizen of that state.

But defendant Grace contends the parties should be realigned so that it stands alone against all the insurers. Such realignment would destroy diversity and deprive the federal courts of jurisdiction over this controversy because Grace, a Connecticut corporation doing business in New York at the start of this litigation, is not diverse from Aetna, a Connecticut citizen, or Royal, a Delaware corporation doing business in New York at the time the complaints were filed. According to Grace, realignment is appropriate because the insurance companies are united in a common effort to deny it insurance coverage in the avalanche of asbestos litigation filed against it. That this challenge to subject matter jurisdiction has been renewed by Grace nearly a decade after the litigation began is unexceptional because jurisdiction may be raised at any time during the course of litigation. *See* Fed. R. Civ. P.

12(h)(3); *see also* 1 Moore et al., *supra*, ¶ 0.74[1], at 764-65.

The relevant focus for determining diversity is the parties' citizenship when suit is commenced. *See Anderson v. Watt*, 138 U.S. 694, 702-03 (1891). The legal principles governing this subject were succinctly summarized by the Supreme Court in *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63 (1941), where Justice Frankfurter wrote: "Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants. It is our duty . . . to 'look beyond the pleadings and arrange the parties according to their sides in the dispute.' . . . Litigation is the pursuit of practical ends, not a game of chess. Whether the necessary 'collision of interests,' . . . exists is therefore not to be determined by mechanical rules. It must be ascertained from the 'principal purpose of the suit,' . . . and the 'primary and controlling matter in dispute' . . . ." *Id.* at 69-70; *see also* 1 Moore, et al., *supra*, ¶ 0.74[1], at 771 ("The purpose of realignment is to ensure that the case truly involves the kind of adversarial relationship constitutionally required in a case or controversy in the federal courts."). Other courts applying the *Indianapolis* standard have focused on different phrases of the above-quoted passage, and as a result different tests have evolved.

Grace urges us to look to the single, primary purpose of Maryland's lawsuit. It argues that a lawsuit must be distilled to its single-issue essence for realignment purposes, and the parties must then "be aligned in accordance with the primary dispute in the controversy, even where a different, legitimate dispute between the parties supports the original alignment." *United States Fidelity & Guar. Co. v. Thomas Solvent Co.*, 955 F.2d 1085, 1089 (6th Cir. 1992); *see also Employers Ins. of Wausau v. Crown Cork & Seal*

Co., 942 F.2d 862, 864 (3d Cir. 1991); *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1523 & n.2 (9th Cir. 1987).

The insurance companies advocate a broader "collision of interests" test. Under this test courts require the existence of an actual, substantial controversy, or a collision of interests, *see Indianapolis*, 314 U.S. at 69, but the conflict may in some cases concern an issue other than the so-called primary issue in dispute. *See generally U.S.I. Properties Corp. v. M.D. Constr. Co.*, 860 F.2d 1, 4-5 (1st Cir. 1988), *cert. denied*, 490 U.S. 1065 (1989); *Zurn Indus., Inc. v. Acton Constr. Co.*, 847 F.2d 234, 237-38 (5th Cir. 1988); *American Motorists Ins. Co. v. Trane Co.*, 657 F.2d 146, 151 (7th Cir. 1981); *Farmers Alliance Mut. Ins. Co. v. Jones*, 570 F.2d 1384, 1387 (10th Cir.), *cert. denied*, 439 U.S. 826 (1978); *Universal Underwriters Ins. Co. v. Wagner*, 367 F.2d 866, 870-71 (8th Cir. 1966). This approach is more flexible because it permits courts deciding whether diversity exists to consider the multiple interests and issues involved in the litigation.

We adopt the collision of interests test to resolve the realignment question. Although not having had occasion to adopt an explicit standard, we have stated that the *Indianapolis* rule requires realignment of parties "according to their real interests so as to produce an actual collision of interests." *Lewis v. Odell*, 503 F.2d 445, 447 (2d Cir. 1974). Further, several district courts within this Circuit have employed the collision of interests approach when realigning parties. *See Syms, Inc. v. IBI Sec. Serv., Inc.*, 586 F. Supp. 53, 56 (S.D.N.Y. 1984); *American Mut. Liab. Ins. Co. v. Flintkote Co.*, 565 F. Supp. 843, 846-47 (S.D.N.Y. 1983); *Irving Trust Co. v. Century Export & Import, S.A.*, 464 F. Supp. 1232, 1241 (S.D.N.Y. 1979).

The primary purpose approach is not actually dictated by *Indianapolis* because though the facts of that case involved only a single controversy among the litigants involving the enforceability of a 99-year lease, the Supreme Court did not intend that all cases be forced into a single-issue posture. *See Zurn Indus.*, 847 F.2d at 237. *Indianapolis* deliberately considered additional, subordinate controversies raised by the parties opposed to realignment and found that they were in fact non-issues. *See* 314 U.S. at 73 n.3. Such discussion would have been wholly irrelevant were the realignment inquiry to concern only the primary purpose of the litigation. *See Travelers Indem. Co. of Ill. v. Metropolitan Life Ins. Co.*, 798 F. Supp. 156, 158 (S.D.N.Y. 1992).

Again, the collision of interests approach is consistent with the Supreme Court's chief concern in *Indianapolis* that parties not manipulate alignment to manufacture diversity jurisdiction. That Court directs us to examine "the realities of the record" to discover the "real interests" of the parties. *Indianapolis*, 314 U.S. at 69. And, realignment is, of course, a fact-specific inquiry. The broader test we embrace does just this in its practical examination of the entire record, while the primary purpose test ignores "actual and substantial ancillary or secondary issues to the primary issue." *Thomas Solvent*, 955 F.2d at 1089.

The purpose in realigning parties is to make sure that there is a *bona fide* controversy between, as the statute commands, citizens of different states. In applying the collision of interests test therefore we must be mindful that actual and substantial conflicts in fact existed at the initiation of the lawsuit. Hypothetical conflicts manufactured by skillful counsel must not control because such an approach would reintroduce the notion of gamesmanship so disparaged by the Supreme Court.

In its effort to defeat diversity jurisdiction, Grace insists that the insurers are united in their efforts to deny Grace coverage. It states that inter-insurer disputes concerning contribution and indemnity are collateral because they will exist only to the extent that insurance coverage is established. This characterization of the facts we think ignores the practical reality of the litigation. Because the insurers are of a single mind to escape liability for paying claims does not mean that they are not in conflict with one another. In fact, the disputes among the insurers have been significant from the start of the lawsuit and produced the required collision of interests to sustain diversity.

Maryland's amended complaint suggests adversity among the insurers with the allegation that its liability "is directly affected by the interpretation of the rights and duties of Grace (or its predecessor companies) and each of the defendant insurers under their respective contracts of insurance." Disunity among the insurers is established further because Continental, Grace's current insurer, *never* has been adverse to Grace and, in fact, is actively pursuing a $60 million counterclaim against Maryland to be indemnified for money it paid to Grace. Continental, in addition, has filed cross-claims against Royal, Aetna and General. The existence of these claims suggests that realignment would be inappropriate even under the primary purpose test. Those courts that have employed the primary purpose test to realign parties in declaratory judgment insurance actions have relied on the fact that every insurer was antagonistic to the insured. *See Thomas Solvent*, 955 F.2d at 1091; *Crown Cork*, 942 F.2d at 866.

Concededly, each insurer—other than Continental—had a goal of escaping liability to Grace. But this interest does not eclipse the equally compelling interest each has to avoid liability to one another. *See Trane*, 657 F.2d at 150;

Irving Trust, 464 F. Supp. at 1241. The insurance companies never doubted that some among their number would be held liable on their policies to Grace. But with millions of dollars at stake, which of them must pay or how far back coverage would extend inevitably pitted each insurer against all the others. *Cf. Lumbermens Mut. Casualty Co. v. Connecticut Bank & Trust Co.*, 806 F.2d 411, 414 (2d Cir. 1986) (affirming stay of federal insurance action in favor of pending state suit because "the determination of [insured's] coverage dispute with any particular insurer necessarily impacts upon the timing of the obligations of the other insurers"). Realignment hinges on those issues that divide the parties, not on those on which they agree. *See American Motorists*, 657 F.2d at 151.

Although the discovery trigger adopted by the magistrate judge relieves all insurers except Continental of liability, at the start of this litigation no insurer could have known what trigger would be applied and how far back in time that trigger would reach to make different insurers liable. The interest of the earlier insurers was only that coverage be triggered after their particular policies had expired, and this interest obviously did not extend to whether the next insurance company in line had to pay.

Recognizing that we examine collision of interests from the perspective of the lawsuit's initiation, the current posture of the parties nonetheless confirms that the insurers were at all times adverse. Although Maryland and Grace have settled, Maryland continues its suit against Royal, Continental and General. This fact belies Grace's contention that the insurers' adversity only comes into play once the fact of coverage is established because only Continental is presently liable to Grace for property damage claims. Hence, in applying the collision of interests test to

determine realignment, we hold that actual and substantial controversies exist among the insurers and Grace to sustain diversity jurisdiction.

II Insurance Coverage Trigger

When it granted summary judgment, the magistrate judge ruled that the discovery trigger for property damage claims controlled as a matter of New York law. Under its ruling "the discovery of damage must occur during the policy period" in order to trigger the insurers' obligation to defend and indemnify Grace. Because Grace did not allege that any building owners in the underlying lawsuits discovered the presence and the hazard of asbestos in their structures before 1973 (Continental, as noted, has been the only insurer of Grace since 1973), there remained no material issue of fact regarding the insurers' obligation to defend or indemnify Grace in these disputes, that is, they had no such duty, and summary judgment was entered against the manufacturer denying coverage.

In reviewing the grant of summary judgment, substantive insurance law will determine which facts are material to the parties' dispute, and "[o]nly disputes over facts that might affect the outcome of the suit" will bar summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Because the adoption of a coverage trigger is a question of substantive insurance law, we review the magistrate judge's grant of such relief *de novo*.

We think that property damage insurance should be treated the same as insurance for bodily injury, which under New York law is governed by an "injury-in-fact" trigger. The relevant language in the insurance policies supports a damage-in-fact trigger for property damage

claims. From adopting such a damage-in-fact trigger, it follows that insurers are obligated on the risk undertaken when asbestos was installed in the buildings involved in the underlying lawsuits against Grace. The reasons for which we reach that conclusion are set forth in the discussion that follows.

A. *Policy Language*

Because the question before us is one of contract interpretation, we begin by examining the language of the disputed insurance policies. The policies provide for "occurrence" coverage and, though their language varies slightly, their definitions of "occurrence" are similar. In this connection, we observe that throughout this litigation Royal repeatedly represented that it would be bound by the interpretation of an "occurrence trigger." It is now too late for it on appeal to attempt to change course and rely instead on accident-based language in its policies.

Thus, the meaning of the word occurrence is important because how that word is defined will determine what event will trigger the insurers' obligation to defend and/or indemnify Grace. *See Abex Corp. v. Maryland Casualty Co.*, 790 F.2d 119, 124 (D.C. Cir. 1986). The following language from Maryland insurance policies issued between 1961 and 1967 is representative:

> "Occurrence" means either an accident or a continuous or repeated exposure to conditions which result during the policy period in injury to or destruction of (a) property including the loss of use thereof which is accidentally caused and (b) tangible or physical property, including the loss of use thereof. All damages arising out of such exposure to substantially the

same general conditions shall be considered as arising out of one occurrence.

The above language incorporates a definition of property damage. The meaning of property damage is critical to our analysis because "for there to be coverage, there must be an occurrence, and for there to be an occurrence there must be property damage as defined in the policy." John P. Arness and Randall D. Eliason, *Insurance Coverage for "Property Damage" in Asbestos and Other Toxic Tort Cases*, 72 Va. L. Rev. 943, 951 (1986). The 1961-67 Maryland policy, the Royal policy and the General policy all define property damage as "injury to or destruction of property, including the loss of use thereof." The 1967-73 Maryland policy defines property damage simply as "injury to or destruction of property."

1. Occurrence

We turn first to the definition of occurrence. The magistrate judge—in a portion of its decision not appealed—adopted the injury-in-fact trigger for bodily injury claims under the Grace policies. This test obligates insurers on the risk when injury—as opposed to either exposure to disease-causing elements or diagnosis of injury—in fact began. The trial court relied on two federal cases interpreting New York law and adopting the injury-in-fact trigger for bodily injuries in the context of asbestos and pharmaceutical product liability, *Abex*, cited earlier, and *American Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 748 F.2d 760 (2d Cir. 1984) (*American Home I*). *See also Continental Casualty Co. v. Rapid-American Corp.*, 80 NY2d 640, 651 (1993) (New York Court of Appeals in an insurance coverage dispute for asbestos bodily injury claims applied the injury-in-fact trigger, "which rests on when the injury, sickness, disease or disability actually began,"

whether discovered or not); *Cortland Pump & Equip. Inc. v. Fireman's Ins. Co.*, 194 AD2d 117, 121 (3d Dept. 1993) (adopting injury-in-fact trigger for an insurance contract covering property damage claims).

Both of the cases relied on by the trial court interpreted standard insurance policy language providing coverage on an "occurrence" basis, *see Abex*, 790 F.2d at 121; *American Home I*, 748 F.2d at 762, and found the contract language to be unambiguous. *See Abex*, 790 F.2d at 127; *American Home I*, 748 F.2d at 764. Interpretation of unambiguous contract language does not bring extrinsic evidence into play. *See Seiden Assocs., Inc. v. ANC Holdings, Inc.*, 959 F.2d 425, 428 (2d Cir. 1992). Because language of the disputed insurance polices is unambiguous, we need not consider arguments by Grace, Maryland and Royal with respect to extrinsic evidence of the drafters' intent.

We recognize of course that contracting parties may elect to define "occurrence" one way in the context of bodily injury and another way in the context of property damage. Although the insurers urge that we treat the occurrence definition for property damage differently than for bodily injury, their contracts have not done so. In the 1967-73 Maryland policies, for example, the same definition of occurrence is used for both types of injury, and at least some of the insurance issued by General uses the same definition of occurrence for both property damage and bodily injury. Moreover, the distinction the insurers seek is addressed more properly in the definition of property damage itself.

The language in the definitions of occurrence at issue is indistinguishable from that viewed as demanding application of the injury-in-fact trigger. *See Rapid-American*,

80 NY2d at 651-52; *Abex*, 790 F.2d at 125-27; *American Home I*, 748 F.2d at 764-65; *Cortland Pump & Equip.*, 194 AD2d at 121. By the plain language of the policies, injury must *result* during the policy period, but it need not be discovered during that time. *See Continental Casualty Co.*, 80 NY2d at 650-51; *American Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 565 F. Supp. 1485, 1495 (S.D.N.Y. 1983) (*American Home II*), *modified*, 748 F.2d 760 (2d Cir. 1984).

New York courts also have held that injury must result during the insurance period to trigger coverage under occurrence-based policies. For instance, in *National Casualty Ins. Co. v. City of Mount Vernon*, 128 AD2d 332, 334 (2d Dep't 1987), the Appellate Division had before it a policy that defined occurrence in language similar to that contained in the policies before us and that applied both to bodily injury and property damage claims. Rejecting the contention that an injury's *cause* must take place during the policy period, the court held that the injuries or damages *resulting* from the causative event must occur during the policy term for it to provide coverage. *Id.* at 336. *Accord Van Wyck Assocs. v. St. Paul Fire & Marine Ins. Co.*, 115 Misc. 2d 447, 450 (N.Y. Sup. Ct. 1982) ("[T]he policy does not include mere exposure to 'conditions' existent during the policy period, but rather focuses on the 'result' in 'bodily injury' during the policy period."), *aff'd*, 95 AD2d 989 (2d Dep't 1983); *American Motorists Ins. Co. v. E.R. Squibb & Sons, Inc.*, 95 Misc. 2d 222, 223 (N.Y. Sup. Ct. 1978) ("[C]overage is predicated not on the act which might give rise to ultimate liability, but upon the result."). ***But see Allstate Ins. Co. v. Colonial Realty Co.*, 121 Misc. 2d 640, 641 (N.Y. Sup. Ct. 1983) (holding that infant's exposure to lead-based paint chips was an occurrence).**

The time at which injury was discovered was not at issue in these cases, but implicit in their holdings is the notion that injury can exist, or "result," independently of discovery or discoverability. *Cf. Schultheis v. Centennial Ins. Co.*, 108 Misc. 2d 725, 727 (N.Y. Sup. Ct. 1981) (construing variant occurrence definition and holding that "[a]ny fair reading of the policy . . . requires the conclusion that the covered risk does not depend on injury being discovered within the policy period"). We have stated, discussing personal injuries, that "[discoverability] need not coincide with the actual occurrence of injury; to add the requirement that an injury be [discoverable] limits the scope of the 'injury-in-fact' trigger-of-coverage clause in a way that is not justified by the policies' language." *American Home I*, 748 F.2d at 765-66. Consequently, under the occurrence definitions here at issue coverage is triggered upon the existence of property damage independent of its discovery.

In reaching a contrary conclusion, the magistrate judge relied on an unpublished New Jersey district court opinion applying New York law. It believed that the standard occurrence definition requires a discovery trigger in the property damage context and distinguished *American Home I*'s adoption of the injury in fact trigger on the ground that that case concerned bodily injury. The trial court reached this conclusion even though the disputed polices define occurrence in the same manner for both property damage and bodily injury. It also found that "[g]iven the long periods of time involved and the difficulty of measuring the exact time that damage to property might occur," the first discovery standard provided insurance carriers with more certainty. We think this reasoning flawed; first, because it fails to consider the plain language of the insurance policies and, second, as discussed

in a moment, proper application of the injury-in-fact trigger does not create unduly burdensome uncertainty for carriers.

2. Property Damage

Thus, the definition of occurrence requires acceptance of an injury-in-fact trigger—perhaps better termed a damage-in-fact trigger here—in Grace's coverage disputes with its insurers. There remains a substantial question concerning correct application of this trigger, one that depends upon the definition of property damage. Only by clarifying the way in which asbestos injures a building can it be determined at what point actual damage occurs.

The insurance policies define property damage as "injury to or destruction of property, including the loss of use thereof." Under this definition, the injury to property need not be a physical injury. Acknowledging this, Royal and Maryland insist damage to property relates only to its market value, which suffers no decline until the owner discovers asbestos is present. Thus, according to these insurers, discovery of asbestos is the proper occurrence of property damage even under the damage-in-fact trigger. We are unable to agree with this proposition.

A reduction in marketability serves as a measure of damages, but it does not constitute an injury to property itself. Rather, it is an effect of injury. Under proper analysis, an event causes injury to property, and this injury in turn causes a decline in market value. In other words, the "decrease in market value merely reflects the recognition that something bad has happened to the building[, and that] 'something bad' is the incorporation of the defective product." Arness and Eliason, *supra*, at 955-56. Ignoring this point, Maryland avers that "property" is a legal

abstraction and may suffer no damage other than a decline in the value of the legal rights tied to real estate. Royal suggests that lost market value affects only the property owners and actually is "wholly independent" of physical change in the property itself. Not only common sense but the underlying lawsuits belie these specious arguments. Building owners seek to remedy conditions directly concerning their structures either by removing or encapsulating asbestos. In making such changes, the owners will affect the buildings' market values. The damage that building owners are seeking to "undo" is not the fact that they discovered asbestos, but the fact of its incorporation in their buildings.

We rule therefore that damage-in-fact occurs upon installation in buildings of products containing asbestos. In interpreting an occurrence-based insurance policy that defined property damage as "injury to or destruction of tangible property," the New York Court of Appeals held that incorporation of a defective product into another product inflicts property damage. *See Sturges Mfg. Co. v. Utica Mut. Ins. Co.*, 37 NY2d 69, 72-73 (1975); *see also Marine Midland Servs. Corp. v. Samuel Kosoff & Sons, Inc.*, 60 AD2d 767, 768-69 (4th Dep't 1977); *Eljer Mfg., Inc. v. Liberty Mut. Ins. Co.*, 972 F.2d 805, 812 (7th Cir. 1992) (applying New York law), *cert. denied*, 113 S. Ct. 1646 (1993). Market value is relevant only to the extent that the damage, *i.e.*, the incorporation of asbestos products, must cause a decrease in market value of the entire product, here the building. *See Sturges*, 37 NY2d at 71; *see also* Arness and Eliason, *supra*, at 955-56.

We agree with the insurers when they insist that concepts of bodily injury may not be imported wholesale into the property damage context. Some types of property damage—such as the gradual contamination of earth and

groundwater by leaking landfills—may be analogous to the slow progression of diseases such as asbestosis and cancer. *See, e.g., New Castle County v. Continental Casualty Co.*, 725 F. Supp. 800, 809 (D. Del. 1989), *aff'd in part and rev'd in part*, 933 F.2d 1162 (3d Cir. 1991). Other sorts of situations, like the installation of asbestos building products, create a different kind of actual injury to property. These different circumstances must be carefully considered in attempting to determine when damage-in-fact occurs.

We fulfill this requirement by holding that installation of asbestos is an occurrence of damage-in-fact and triggers the insurance coverage in effect at that time. The actual injury to property—the presence of the asbestos hazard—occurs upon installation and exists regardless of whether it yet has been discovered by the building owners. *See Stonewall Ins. Co. v. National Gypsum Co.*, No. 86 Civ. 9671, 1992 WL 123144, at *14 (S.D.N.Y. May 27, 1992).

This is a case where measurable and compensable property damage has occurred, though not yet ascertained by the property owner. *See American Home II*, 565 F. Supp. at 1498. In fact, even where courts have adopted discovery triggers for property damage, they have acknowledged that damage actually existed before it was discovered. *See Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325, 1328 (4th Cir. 1986); *American Home Assurance Co. v. Libbey-Owens-Ford Co.*, 786 F.2d 22, 29 (1st Cir. 1986). In those cases—concerning respectively the slow leaking of hazardous waste and the failure of a building's windows over an extended period of time—the difficulty of determining when damage in fact occurred influenced the trigger decision. In contrast to those factual situations, it is relatively easy—certainly not unduly burdensome—to

determine at what point Grace's products were installed in the various buildings.

Next, it must be decided whether the injury to property continues after the discrete event of asbestos installation. If property damage is ongoing, then it is possible to trigger several successive insurance polices because the damage-in-fact occurs over a time continuum. *See McGroarty v. Great Am. Ins. Co.*, 36 NY2d 358, 365-66 (1975). If such is the rule then injury need not be reduced to a single event fixed in time. *See Mount Vernon*, 128 AD2d at 337. But asbestos property damage is unlike the gradual leaking of hazardous waste from a landfill or the gradual cracking and shifting of a building's foundation. Once installed, the damage that asbestos inflicts is complete. The underlying plaintiffs contend that asbestos fibers are constantly released and re-entrained into a building's atmosphere, creating further property damage. If such deterioration in fact exists, its damaging effect concerns solely the health of those persons who breathe the contaminated air. No further property damage occurs because the need to remove or encapsulate the asbestos, which occurred upon the product's installation, remains unchanged. *See* Arness and Eliason, *supra*, at 972-73; *see also Stonewall*, 1992 WL 123144, at *17.

In their advocacy of a discovery trigger for asbestos property damage, the insurers also promote the need for certainty and a "bright-line test." Holding that damage-in-fact occurs only upon installation of asbestos products meets the goals of providing certainty for contracting parties and reducing administrative costs. Maryland nonetheless asserts that the discovery trigger is superior in this regard because it "helps to ensure that those policies were underwritten and issued when sufficiently current information was available to enable insurers to perform their

predictive function, and to set premiums accordingly." This approach improperly would penalize Grace, a manufacturer that contracted and paid for insurance before 1973, because of the insurers' relative lack of information. Moreover, the very function of occurrence insurance recognizes the latent nature of the damages insured against and the possible insidious hazards of a manufacturer's products. *American Home II*, 565 F. Supp. at 1496; *see also Eljer*, 972 F.2d at 809 ("Once a risk becomes a certainty—once the large loss occurs—insurance has no function.").

Consequently, we hold that damage-in-fact occurs to property at the time asbestos products are installed, and injury to property does not continue after that event. Insurers on the risk at the time of installation are obligated under their policies with Grace.

B. *Application of Trigger*

The damage-in-fact trigger requires an examination of each underlying claim to determine when property damage—the installation of asbestos—occurred. *See American Home I*, 748 F.2d at 765. Importantly, the burden will remain with Grace to prove the existence of coverage. *Abex*, 790 F.2d at 129-30. Generally, the insured must prove the cause of the occurrence, the result, and that the result occurred during the policy period. *American Home II*, 565 F. Supp. at 1497. We are mindful of the fact that the occurrence policies at issue contemplate an injury resulting from a preceding cause, *see American Home I*, 748 F.2d at 764, but in the case of asbestos property damage, cause and effect are very close in time. On remand therefore the trial court must examine the facts of the underlying lawsuits to determine at what time Grace's

asbestos products were incorporated into the various buildings that allegedly suffered property damage.

CONCLUSION

The federal courts have jurisdiction over this litigation because a sufficient collision of interests exists among the insurers to defeat Grace's request for realignment of the parties that would eliminate diversity. On the merits, we adopt the damage-in-fact trigger for the occurrence of property damage under Grace's insurance policies and reverse the magistrate judge's entry of summary judgment on this issue after it applied a discovery trigger for coverage. The case is remanded to that court for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
S.D. NEW YORK.

March 6, 1991.
No. 83 Civ. 7451 (SWK).

THE MARYLAND CASUALTY COMPANY,

Plaintiff,

—v.—

W.R. GRACE AND COMPANY, Continental Casualty Company, Royal Indemnity Company, Aetna Casualty & Surety Company, and General Insurance Company of America,

Defendants.

Insurer sought declaratory judgment that it had no obligation to defend and indemnify insured in actions to recover for asbestos-related bodily injury and property damage. Insured filed counterclaim. Insurer added as defendants insurers for corporations acquired by insured. Motions for summary judgment were filed. The District Court, Bernikow, United States Magistrate Judge, held that: (1) coverage for bodily injury claims was triggered upon injury in fact; (2) coverage for property damage claims was triggered upon discovery; (3) policies issued to insured, acquiring corporation, did not provide coverage for preacquisition activities of acquired corporations; and (4) insurers for acquired corporations were required to defend acquiring corporation.

Motions granted in part and denied in part.

Laura A. Foggan, Wiley, Rein & Fielding, Washington, D.C., for Maryland Cas. Co.

Randy Paar, Anderson, Kill Olick & Oshinsky, P.C., New York City, for defendant W.R. Grace & Co.

Stuart C. Levene, Ford Marrin Esposito & Witmeyer, New York City, for defendant Continental Cas. Co.

James P. Donovan, Wilson, Elser, Moskowitz, Edelman & Dicker, New York City, for defendant Royal Indem. Co.

James E. Rocap, III, Miller, Cassidy, Larroca & Lewin, Washington, D.C., for defendant Aetna Cas. & Sur. Co.

Albert D. Brault, Brault, Graham, Scott & Brault, Rockville, Md., for defendant General Ins. Co. of American.

OPINION

BERNIKOW, United States Magistrate Judge:

This case, like many others across the country, involves a dispute between an insured and insurers concerning coverage for underlying asbestos personal injury and property damages cases.[1] The parties' motions for partial summary judgment are now before the court.[2]

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[1] This case was referred to the undersigned with the consent of the parties, pursuant to 28 U.S.C. § 636(c).

[2] All parties but defendant Continental Casualty Company ("CNA") have moved for summary judgment.

BACKGROUND

Maryland Casualty Company ("Maryland") initially brought this declaratory judgment action, based on diversity of citizenship, against W.R. Grace & Co. ("Grace") and CNA, concerning its obligations to defend and indemnify Grace under Maryland's comprehensive general liability ("CGL") insurance policies issued to Grace between 1955 and June 30, 1973, in regard to asbestos-related bodily injury and property damage lawsuits. These underlying lawsuits are "part of the national 'asbestos scene, an unparalleled situation in American tort law,' in which many thousands of personal injury claims have been filed 'against asbestos manufacturers and producers.' " *Racich v. The Celotex Corp.*, 887 F.2d 393, 394 (2d Cir.1989) (quoting *In re School Asbestos Litigation*, 789 F.2d 996, 1000 (3d Cir.), *cert. denied*, 479 U.S. 852, 107 S.Ct. 182, 93 L.Ed.2d 117 (1986)).

As of November 3, 1987, over 6,400 asbestos-related lawsuits have been filed against Grace for bodily injury arising out of exposure to asbestos or asbestos-containing products manufactured or sold by Grace or its predecessors. Posner November 13, 1987 affidavit at ¶ 19. Grace has also been sued in 134 cases that seek damages for property damage resulting from asbestos-containing products that were installed in various buildings throughout the country from the mid-1940's until the 1970's. Posner June 1, 1987 affidavit at ¶ 14.

In its answer, filed on January 27, 1984, Grace asserted various counterclaims including those seeking a declaratory judgment regarding Maryland's duty to defend and indemnify. On April 30, 1984, Grace started an action against the Royal Indemnity Company ("Royal") in the District of Columbia Superior Court for the same declaratory relief it sought against Maryland. Grace later amended its District of Columbia complaint to add Aetna Casualty and Surety Co. ("Aetna") and the General Insurance Company of America ("General") as defendants. On June 21, 1984, Maryland suc-

cessfully moved in this court to join Royal, Aetna and General as additional defendants.

Grace, a Connecticut corporation, with its principal place of business in New York, is primarily engaged in the chemical business on a worldwide basis and in energy-related natural resource activities. Posner 5-29-87 affidavit at ¶ 3. Maryland, a Maryland corporation, has its principal place of business in Baltimore, Maryland.

CNA, an Illinois corporation, has its principal place of business in Chicago, Illinois. Royal is a Delaware corporation, with its principal place of business in Charlotte, North Carolina. Aetna, a Connecticut corporation, has its principal place of business in Hartford, Connecticut. General is incorporated in the State of Washington and has its principal place of business in Seattle, Washington. Maryland, CNA, Royal, Aetna and General are engaged in the business of providing and underwriting insurance, including the extension of liability insurance coverage. Of the five insurers, only Maryland and CNA issued policies to Grace itself. The other carriers allegedly issued policies to companies subsequently acquired by Grace.

Grace, in its own name, purchased policies from Maryland from 1955 to 1973, though Maryland denies that it provided continuous coverage for that period. Maryland notes that Grace has produced no primary policies in effect during the early years of the alleged period of coverage. The policies for the period from June 30, 1962 through June 30, 1970, Maryland asserts, are incomplete and, in some cases, fragmentary. Thus, Maryland has placed in issue the extent of its obligation to Grace for any asbestos-related claims arising before the periods for which any policies or policy fragments have been discovered and for the period as to which no complete policies have been discovered. Grace contends that it has located the originals of the policies, which include the missing pages, thus resolving Maryland's argument about missing pages.

Maryland also notes that its policies with Grace were negotiated in New York City between its own representatives and

those of Grace. The policies, Maryland adds, were not the standard forms used in the insurance industry, but were individually tailored and negotiated "manuscript" policies, whose provisions were authored by Grace or by its brokers, and not by Maryland. Nonetheless, as Grace notes, a comparison of Maryland's policy language with the standard comprehensive general liability ("CGL") forms shows that the language is essentially the same.[3] Indeed, the managing director of the broker, Marsh & McLennan, Inc., involved in the negotiation and placement of the Maryland policies sold to Grace from at least June 30, 1961, through June 30, 1973, stated in an affidavit that the policies from June 30, 1961 to June 30, 1967

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[3] Under the Maryland-Grace policies, Maryland agrees:

> Coverage A—Bodily Injury Liability To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death a any time resulting therefrom, sustained by any person and caused by accident.
>
> Coverage B—Property Damage Liability To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident.

Exh. #B, tab 1, to Maryland's Memo in Support of Motion. Endorsements deleted the words "and caused by accident" and substituted the word "occurrence" for the word "accident" under Coverage A. *Id.* at tab 2.

The standard CGL policy requires an insurer to indemnify an insured for all damages that result from "bodily injury or property damage to which [the] policy applies caused by an occurrence." *See, e.g., Abex Corp. v. Maryland Casualty Co.*, 790 F.2d 119, 122 (D.C.Cir.1986).

In1966, the insurance industry redrafted the standard CGL policy. *American Home Products Corp. v. Liberty Mutual Ins. Co.*, 565 F.Supp. 1485, 1501 (S.D.N.Y.1983), *aff'd as modified*, 748 F.2d 760 (2d Cir.1984). Prior to 1966, CGL policies covered liability, as set forth above in Coverage A, because of bodily injury *caused by accident. Id.* "The word 'accident' suggested an intent to cover only sudden, unexpected, but identifiable events." *Id.* The industry substituted the word "occurrence" for the word "accident" and "expressly provided that an occurrence included any injury or damage that resulted, not only from an accident, but also from injurious exposure over an extended period." *Id*

were standard form CGL policies, not drafted by Grace. *See* Keating November 16, 1987 affidavit at ¶ 3. He recognized that the policies from June 30, 1967 to June 30, 1973, were "manuscript" policies, but, he added, the language contained in them was taken from the standard form CGL policy.[4] *Id.* at ¶ 4.

With respect to the other insurers, Grace alleges that it, or various asbestos companies that it acquired, purchased CGL policies from Royal for all or part of the period from April 1, 1950 to April 1, 1963 and from May 26, 1967 to March 26, 1968. As for General, Grace alleges that General sold CGL coverage to Vermiculite Northwest, a company acquired by Grace in 1966, from June 1, 1961 to June 1, 1967. Grace also contends that Aetna sold CGL policies to companies acquired by Grace from January 31, 1951 until January 1, 1970. Grace does not possess copies of these policies, but asserts it has secondary evidence proving the existence of this coverage. Lastly, CNA directly sold CGL coverage to Grace from 1973 to the present.

In regard to the motions for partial summary judgment, Maryland requests relief in the form of a judgment declaring that:

> (i) Maryland Casualty has no duty to indemnify or defend Grace for periods as to which the existence and terms of Maryland Casualty-Grace policies have not been proven by clear and convincing evidence;
>
> (ii) Maryland Casualty has no duty to indemnify or defend Grace (a) under pre-1963 policies or (b) for liability involving products of any company acquired by or merged with Grace until after the date on which such company was acquired by or merged with Grace and insured under a Maryland Casualty policy;

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[4] The affidavit of an underwriter at Maryland, which indicates that the 1967-73 policies were manuscript policies, *see* second Gallt affidavit at ¶ 2, does not undermine the Keating affidavit.

(iii) Maryland Casualty has no duty to indemnify or defend Grace for liability for asbestos-related bodily injury claims as to which injury in fact occurred outside Maryland Casualty's policy periods;

(iv) Defense costs in each asbestos-related bodily injury case against Grace must be shared by all insurers as to which responsive policies have been proven except where it can determined that the injury in fact occurred outside of the policy period or periods of an insurer or that the claimed injury could not have resulted from exposure to a product manufactured by an insured under the relevant policy or policies;

(v) Maryland Casualty has no duty to indemnify or defend Grace for liability for asbestos-related claims for equitable or declaratory relief or any relief other than the award of damages;

(vi) Maryland Casualty has no duty to indemnify or defend Grace for liability for claims against Grace by school districts or other building owners ("school asbestos cases") seeking to recover the costs allegedly incurred, or to be incurred, by them in testing their buildings for the presence of asbestos insulation, and removing or encapsulating such insulation or taking other prophylactic or preventive measures with respect to such buildings and such claims do not seek compensation for property damage;

(vii) Maryland Casualty has no duty to indemnify or defend Grace for liability for school asbestos cases to recover for strictly monetary injuries not constituting compensation for property damage;

(viii) Maryland Casualty has no duty to indemnify or defend Grace for liability for school asbestos cases to recover for damage to Grace's products;

(ix) Maryland Casualty has no duty to indemnify or defend Grace for liability for school asbestos cases because those cases seek to recover for hazards that were discovered or manifested subsequent to any Maryland Casualty policy periods;

(x) Any duty of Maryland Casualty to indemnify Grace for any asbestos-related property damage claims that may be found by the Court is limited by policy endorsements restricting liability for "continuous discharge . . . of . . . materials";

(xi) Maryland Casualty has no duty to indemnify Grace for liability for injuries that were not "unexpectedly," "unintentionally," or "accidentally" caused including, but not limited to, the *City of Greenville* case;

(xii) Maryland Casualty has no duty to indemnify Grace for any award of punitive damages, sanctions, fines or penalties imposed upon Grace.

Maryland Casualty further requests relief in the form of a judgment ordering Aetna, Royal and General, to the extent that Grace is able to establish that those insurers afforded responsive coverage, to reimburse Maryland Casualty for past costs of defending Grace in the asbestos-related bodily injury cases against Grace and to share with Maryland Casualty and CNA in those expenses in the future, except where it can be determined that the injury in fact occurred outside the policy period or periods of any insurer or that the claimed injury could not have resulted from exposure to a product manufactured by an insured under the relevant policy or policies.[5]

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[5] Maryland has participated in the defense of Grace in underlying bodily injury actions. CNA provided or paid for Grace's defense in the underlying actions through July 31, 1990, when it exhausted the indemnity limits of all its applicable primary policies. CNA estimates its costs for defending Grace have exceeded $100 million. Recently, CNA moved to amend its answer to assert the defense that its policy limits have been exhausted and to assert counterclaims against Maryland and cross-claims against Royal, Aetna and General for indemnity and contribution for the costs it paid in providing Grace with defenses in the underlying actions.

Grace has moved for partial summary judgment seeking a declaration that each of the policies sold by Maryland, Royal and General is obligated to indemnify Grace for asbestos-related property damage claims if the policy was in effect during any portion of the continuous damage process, from the first installation of the asbestos products through containment or removal. Grace seeks a similar declaration from the same insurers concerning asbestos-related bodily injury claims if the policy was in effect during any portion of the continuous injury process from first inhalation of asbestos fibers through manifestation of the asbestos-related disease.

Grace also seeks summary judgment requiring the carriers to pay all past, present and future defense costs. Further, Grace seeks a declaration that any triggered policy provides full and complete defense and indemnity coverage. In addition, Grace requests judgment against Maryland, Royal and General, jointly and severally, for the monies already expended by Grace to defend the asbestos-related cases, and to satisfy any judgments or settlements in those cases. Grace has not filed any claims against CNA and its motion for summary judgment is not directed against CNA.

Royal seeks partial summary judgment, declaring that Grace is not entitled to any CGL coverage issued by Royal to one of Grace's predecessor companies, the Zonolite Company ("Zonolite"). Royal never issued any policies to Grace. Royal also moves for summary judgment declaring that its defense obligation will terminate upon the exhaustion of the limits of its pre-1966 policies. Should the court find that Royal owes Grace a defense, Royal seeks guidance concerning the proper trigger of coverage for the asbestos-bodily injury cases pending against Grace.

Aetna seeks partial summary judgment declaring that Grace is not entitled to a defense under a policy issued to a predecessor company until it is shown that the claimant alleges injury or damage arising out of asbestos products distributed by that predecessor company. Aetna seeks similar relief regarding its duty to indemnify Grace. Aetna also requests a

declaration that the Illinois statute limiting the time during which actions may be brought by or on behalf of dissolved corporations bars Grace from seeking coverage under policies that may have been issued to California Zonolite Company ("California Zonolite") and Ari–Zonolite Company ("Ari–Zonolite"). Aetna, like Royal and General, did not issue any policies to Grace. Grace alleges that Aetna issued policies to three predecessor companies of Grace, i.e., California Zonolite, Ari Zonolite and Western Mineral Products ("Western Mineral"). No party, however, has produced copies of any of these policies and Aetna disputes the existence of the policies. It seeks summary judgment in the event the policies are shown to exist. We have not considered those issues unique to Aetna. They will be considered when, and if, Grace establishes the existence of the policies. A number of issues, however, that concern Aetna involve the other insurers and the determination of those issues will affect Aetna.

General seeks summary judgment on Grace's cross-claim, which asserts that General is obligated to fully defend and indemnify Grace under policies issued to General's former insured, Vermiculite–Northwest, Inc. ("Vermiculite–Northwest"). Like Royal and Aetna, General seeks a declaration that it has no duty to Grace until Grace shows that the underlying claims implicate a product of Vermiculite–Northwest.

The insurers, other than CNA, also ask for a declaration that, to the extent the underlying suits do not seek damages, no coverage is afforded for them under the policies at issue. In other words, coverage does not apply, according to the insurers, to suits that seek other forms of relief, such as declaratory or equitable relief.

DISCUSSION

Summary Judgment

The general principles concerning summary judgment have become familiar. Fed.R.Civ.P. 56(c) authorizes summary judgment when there is no genuine issue as to any material fact

and the moving party is entitled to a judgment as a matter of law. The moving party bears the burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). And all factual inferences, and ambiguities, are drawn against the moving party. *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 465 (2d Cir.1989). The court's function on a motion for summary judgment is not to try issues of fact, but to determine whether there are any genuine issues of fact for trial. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 249, 106 S.Ct. 2505, 2510-11, 91 L.Ed.2d 202 (1986). Furthermore, under Rule 56(e), "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

Trigger of Coverage for Bodily Injury Claims

The first issue the parties raise concerns the trigger of coverage for bodily injury claims. The insurer "on the risk" at the triggering time must provide coverage. *Eagle–Picher Industries v. Liberty Mutual Ins. Co.*, 523 F.Supp. 110, 111 (D.Mass. 1981), *modified on other grounds*, 682 F.2d 12 (1st cir. 1982). This issue "usually arises when several different insurers have, in sequence, insured a company whose products caused injuries at different or uncertain times." *Uniroyal, Inc. v. Home Ins. Co.*, 707 F.Supp. 1368, 1387 (E.D.N.Y.1988). Maryland argues that the bodily injury claims and, for that matter, the property damage claims, fall outside its policy periods and, thus, its policies are not triggered.

Citing *Keene Corp. v. Ins. Co. of North America*, 667 F.2d 1034 (D.C.Cir.1981), *cert. denied*, 455 U.S. 1007, 102 S.Ct. 1644, 71 L.Ed.2d 875 (1982) ("*Keene*"), Grace argues that all policies on the risk during the continuous bodily injury process, from first exposure to asbestos through manifestation of

the asbestos-related disease, must pay in full Grace's legal liability for all asbestos-related bodily injury claims and lawsuits against Grace. In *Keene*, the court rejected the manifestation theory, which requires manifestation of injury during the policy period, as the only trigger of coverage in delayed manifestation cases. *Id.* at 1046. Inhalation exposure (exposure to asbestos dust) and exposure in residence (the subsequent development of the disease) also trigger coverage, the *Keene* court found. *Id.* The *Keene* court concluded that once triggered, each policy on the risk covered the insured's liability. *Id.* at 1048.

In *American Home Products Corp. v. Liberty Mutual Ins. Co.*, 565 F.Supp. 1485 (S.D.N.Y.1983), *aff'd as modified*, 748 F.2d 760 (2d Cir. 1984) ("*AHP*"), however, Judge Sofaer, applying New York law,[6] rejected the conclusions reached in Keene. Instead, Judge Sofaer determined that actual injury triggers coverage. *Id.* at 1489. Grace argues that *AHP* does not apply here because that case involved six different pharmaceutical products, not asbestos. *See AHP*, supra, 565 F.Supp. at 1490 n. 1. If any doubt existed as to *AHP*'s applicability to asbestos in New York, *Abex Corp. v. Maryland Casualty Co.*, 790 F.2d 119, 124-25 (D.C.Cir.1986), put it to rest. The same court that decided *Keene*, after examining the applicable New York case law applied *AHP* to asbestos. *Id.* at 125. The court also noted that *Keene* did not purport to apply

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[6] Maryland contends that New York law governs this case with respect to its policies with Grace. Maryland notes that Grace has its principal place of business in New York and the policies were obtained through a New York broker and issued, delivered and administered through Maryland's New York office. *See W.R. Grace & Co. v. Continental Casualty Co.*, 896 F.2d 865, 873 (5th Cir.), *reh'g denied*, (5th Cir. 1990); *W.R. Grace & Co. v. Hartford Accident and Indemnity Co.*, 407 Mass. 572, 555 N.E.2d 214, 221 (1990). Grace disputes that New York law governs, but says that the result is the same, regardless of whether New York's law controls. Nevertheless, Grace cites, for the most part New York cases. Thus, we apply New York law to the Maryland–Grace issues. *See Alfin, Inc. v. Pacific Ins. Co.*, 735 F.Supp. 115, 118 (S.D.N.Y. 1990).

New York law. *Id.* at 124. Not only that, the *Abex* court's own reading of the policy language, which it termed unambiguous, agreed with the result in *AHP*. Still, Grace contends that *Abex* should have relied on New York state cases, and not on *AHP*.

Grace makes much of *National Casualty Ins. Co. v. City of Mount Vernon*, 128 A.D.2d 332, 515 N.Y.S.2d 267 (2d Dep't 1987), decided after *Abex*. *Mount Vernon*, Grace says, applied a continuous trigger, citing *Keene*. In *Mount Vernon*, a dispute about coverage, the underlying action concerned a suit against the city for false arrest and false imprisonment. The insurance company in that case denied coverage to the city because the arrest at issue occurred about a year and a half before the policy's effective date of January 1, 1983. The court found, however, that the insurance company had a duty to defend and indemnify the city for the damages sustained by the claimant in the underlying suit as a result of his incarceration on and after January 1, 1983 until his release, some seven days later. 515 N.Y.S.2d at 271. This finding by the Appellate Division modified the lower court's ruling that required the insurance company to defend and indemnify without regard to the policy date. What is more, the Appellate Division said: "the operative event triggering exposure, and thus resulting in coverage under the policy, is the sustaining of a specified injury during the policy period." *Id.* at 270.

The principal dispute in *Mount Vernon* concerned the meaning of the term "occurrence." The Appellate Division rejected the insurance company's position that the term refers to the precipitating event—the arrest—that gave rise to the injury. 515 N.Y.S.2d at 270. The *Mount Vernon* policy language, like the language here, said that occurrence means an event that results in personal injury sustained during the policy period. *Id.* Therefore, the court was not concerned with whether the causative event happened before or during the policy period. *Id.* The policy did not require that the injury resulting from that event occur at one fixed time. *Id.* Nor did the policy distinguish between injuries that are continuous and the more common type of injuries that are not. *Id. See also Keene*, 667

F.2d at 1049. The Appellate Division cited *Keene*—with a "cf."—for the proposition that the failure to distinguish between continuous and non-continuous injury has particular significance because of express policy language that injury can be caused by " 'continuous or repeated exposure to conditions.' " *Mount Vernon*, 515 N.Y.S.2d at 270 (quoting policy); *see also Keene*, 667 F.2d at 1049 n. 31.

Thus, we do not read *Mount Vernon*'s reference to *Keene* as an adoption of its continuous trigger theory. Moreover, *Mount Vernon*, as noted, held that a specified injury during the policy period triggers coverage, *see W.R. Grace & Co. v. Continental Casualty Co.* ("*W.R. Grace & Co.*"), 896 F.2d 865, 876 (5th Cir.), *reh'g. denied*, (5th Cir.1990)—a result consistent with *AHP*'s injury-in-fact trigger.

Grace also argues that other New York State cases support a continuous trigger theory. Nevertheless, *Abex* considered most of the cases Grace cites[7] and found that, though these cases did not offer a "unambiguous embrace" of the injury-in-fact theory, they were far more consistent with that theory than with the continuous trigger. *Abex*, 790 F.2d at 126. Similarly, the court in *Aetna Casualty & Surety Co. v. Abbott Laboratories, Inc.* ("*Abbott*") 636 F.Supp. 546, 550 (D.Conn. 1986), a case involving the drug DES and some policies covered by New York law, applied *AHP*'s injury-in-fact trigger. More recently, Judge Weinstein observed that the federal courts applying New York law adopt the injury-in-fact theory under a comprehensive general liability policy. *Uniroyal, Inc. v. Home Ins. Co.*, 707 F.Supp. 1368, 1387-88 (E.D.N.Y.1988). And even more recently, the Fifth Circuit noted that New York follows the injury-in-fact theory. *W.R. Grace & Co.*, 896 F.2d at 875-76. Accordingly, we find that injury-in-fact triggers coverage in New York.

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[7] *Abex* recognized that *Allstate Ins. Co. v. Colonial Realty Co.*, 121 Misc.2d 640, 468 N.Y.S.2d 800 (Sup.Ct., Queens Co.1983), cited by Grace, adopted the exposure theory, but felt that this lower court decision did not send a clear signal in the face of other courts' doubts concerning that theory. *Abex*, 790 F.2d at 126 n. 33.

Grace argues, however, that extrinsic evidence is necessary to interpret the policy language at issue. The disparate constructions placed by courts on the same policy language, according to Grace, shows ambiguity as a matter of law. Grace further notes that it did not draft the disputed language. Following *Abex* and *AHP*, however, we find the policy language is unambiguous. Grace maintains that *AHP* did not involve asbestos. Nevertheless, *Abex* involved asbestos and the court there said:

> The plain language of the definition of "occurrence" used in the CGL policy requires exposure that "results, *during the policy period*, in bodily injury" in order for an insurer to be obligated to indemnify the insured. The unambiguous meaning of these words is that an *injury*—and not mere exposure—must result *during the policy period*.

790 F.2d at 127 (emphasis in original);[8] *see also AHP*, 748 F.2d at 765. Thus, extrinsic evidence need not be considered.

On the question of when injury in fact occurs, Grace argues that the asbestos-related bodily injuries in the underlying cases are inherently continuous, and, thus, even under *AHP*, each carrier on the risk at any time between first exposure and manifestation has the duty to indemnify. Maryland, for its part, urges that we follow Judge Sofaer's approach of establishing the timing of injury in fact on a case-by-case basis in the underlying actions. *See AHP*, 565 F.Supp. at 1509. We agree with Maryland. Though Grace argues that the etiology of asbestos-induced diseases is well known, the issue, according

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[8] The CGL policy in Abex defined "occurrence" as follows: "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured." 790 F.2d at 122. In the present case, the typical policy defines "occurrence" as "an event, or continuous or repeated exposure to conditions, which unexpectedly causes injury during the policy period." Exh. A. to 6-1-87 Posner affidavit. These two definitions contain no meaningful differences. Other policies in this case contain similar language.

to the *Abex* court, has split the circuits. *Abex*, 790 F.2d at 127 n. 36. *Abex* contrasted *Insurance Co. of N.Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1218 (6th Cir.1980), *clarified*, 657 F.2d 814, (6th Cir. 1981), *cert. denied*, 454 U.S. 1109, 102 S.Ct. 686, 70 L.Ed.2d 650 (1981), which observed that injury, in the sense of tissue damage, occurs shortly after the initial inhalation of asbestos fibers, with the view of *Eagle-Picher Indus. Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12, 19 (1st Cir.1982), *cert. denied*, 460 U.S. 1028, 103 S.Ct. 1279, 75 L.Ed.2d 500 (1983), that even sub-clinical injury to the lung does not occur simultaneously with the inhalation of asbestos. *Id.*

In *AHP*, Judge Sofaer also recognized the difficulty in determining the onset date of asbestos injury. Commenting about the usefulness of collateral estoppel on medical issues to prove when injury occurred, Judge Sofaer excluded asbestos from the operation of that doctrine. *See* 565 F.Supp. at 1509. He said: "Unlike the variable manner in which injuries are caused by asbestos fibres, other products may produce specific consequences at particular times" *Id.* Accordingly, summary judgment is inappropriate on the issue, the resolution of which is better left to the underlying cases. *See AHP*, 565 F.Supp. at 1509; *Abbott*, Civil No. H-82-843 (JAC) slip op. at 2 (D.Conn. September 11, 1987); *Abbott*, 636 F.Supp. at 551. In those cases the courts will likely address related factual issues concerning the injuries at issue. *Abbott*, slip op. at 2.

With regard to those cases that have settled, the court hearing the coverage dispute—this court— should determine the date of the injury in fact. *Abbott*, 636 F.Supp. at 551-52. In *Abbott*, the court directed the parties confer to develop a procedure for resolution of the settled cases. *Id.* at 551. The present parties should do the same. The fact of settlement, though, does not create coverage. In other words, an insurer has no duty to indemnify a settled claim excluded by the policy. *Uniroyal*, 707 F.Supp. at 1379. The duty to indemnify requires a covered loss under the policy. *Servidone Construction Corp. v. Security Insurance Co.*, 64 N.Y.2d 419,

423, 488 N.Y.S.2d 139, 143, 477 N.E.2d 441, 445 (1985); *see W.R. Grace & Co.*, 896 F.2d at 874 (citing *Servidone*); *Uniroyal*, 707 F. Supp. at 1379 (citing *Servidone*). In determining whether a settled claim involves a covered loss—from the actual facts, not the pleadings—the burden rests with the insurer to show that the claim was not within the policy coverage. *Servidone*, 488 N.Y.S.2d at 143, 477 N.E.2d 445; *Burroughs Wellcome Co. v. Commercial Union Ins. Co.*, 713 F.Supp. 694, 699 (S.D.N.Y.1989). An argument can be made that placing the burden on the insurer only applies to cases, like *Servidone*, involving a policy exclusion. 488 N.Y.S.2d at 143, 477 N.E.2d at 445. But the first paragraph of the *Servidone* opinion, which summarizes the court's holding, imposes no such limitation. 488 N.Y.S.2d at 140, 477 N.E.2d at 442. *Burroughs Wellcome*, too, did not limit its finding. 713 F.Supp. at 699; *see also Uniroyal* (*Servidone* "never held that an otherwise covered claim, once settled, must be proven anew by the insured.") 707 F.Supp. at 1379.

On the duty to defend, the insured's burden is not great. Grace is entitled to a defense if the complaints in the underlying actions " 'permit proof' of the facts establishing coverage or if the complaints do not exclude the possibility that injury-in-fact occurred during the policy period. Only if the insurers establish, '*as a matter of law*, that there is no possible factual or legal basis on which the insurer might eventually be obligated to indemnify,' would they escape their duty defend [Grace]." *Abex*, 790 F.2d at 129 (footnotes omitted) (emphasis in original); *see also Avondale Indus. Inc. v. Travelers Indemn. Co.*, 887 F.2d 1200, 1205 (2d Cir. 1989), *reh'g denied*, 894 F.2d 498 (2d Cir.) (per curiam), *cert. denied*, 496 U.S. 906, 110 S.Ct. 2588, 110 L.Ed.2d 269 (1990). Thus, the insurers must satisfy their obligation to defend Grace. *Id.* "This obligation will continue until the insurers establish that, as a matter of law, there is no possibility that they will have to indemnify [Grace]." *Id.* For those policies, then, that Grace has proven, or will prove, Maryland must provide a defense, *see Abex Corp. v. Maryland Casualty*

Co., No 82-2098, slip op. at 2 (D.D.C. April 6, 1990), provided those policies have been triggered applying the injury in fact trigger.

As for allocating defense costs among the insurers, which Maryland urges, those costs should be apportioned equally. *Federal Insurance Co. v. Cablevision Systems Development Co.*, 836 F.2d 54, 57 (2d Cir.1987); *Abex Corp. v. Maryland Casualty Co.*, No. 82-2098, slip op. at 3 (D.D.C. April 5, 1990). Nonetheless, summary judgment appears premature because the existence of coverage concerning all the insurers remains an open issue. *See* Proof of Existence of Terms of Polices, *infra*.

Coverage for Knowing Misconduct

Maryland seeks summary judgment declaring that it has no duty to indemnify Grace for injuries that were not unintentionally caused. Grace, on the other hand, seeks a declaration that any triggered policy provides full and complete defense and indemnity coverage, and that no portion of this liability can be allocated to Grace. Maryland contends that Grace has no coverage for losses due to Grace's knowing misconduct. Thus, Maryland maintains that it has no duty to indemnify Grace for expected injuries. Most liability insurance policies provide coverage only for bodily injury or property damage that the insured neither expects nor intends, Maryland says. In regard to the Maryland policies, this exclusion, set forth in special, hand-crafted endorsements, provides in more categorical terms, Maryland argues, that coverage is afforded only for injuries "unexpectedly," "unintentionally" or "accidentally" caused.[9]

In particular, Maryland seeks summary judgment that it has no duty to indemnify for any liability imposed upon Grace in *City of Greenville v. W.R. Grace & Co.*, No. 85-1693-14

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[9] An endorsement, for example, states " 'Occurrence' means an event, or continuous or repeated exposure to conditions, which *unexpectedly* causes injury during the policy period." Exh. B, tab 2 to Maryland's Memorandum in Support of Motion (filed under seal) (emphasis added).

(D.S.C., complaint filed June 21, 1985). After a jury trial in that case, the court awarded $6.4 million in compensatory damages and $2 million in punitive damages against Grace. In *Greenville*, the court in an amended order, commented that Grace knew of the hazard of asbestos in buildings when it sold its asbestos products to the city. *City of Greenville v. W.R. Grace & Co.*, 640 F.Supp. 559, 566 (D.S.C.1986), *aff'd*, 827 F.2d 975 (4th Cir.1987), *reh'g denied*, 840 F.2d 219 (4th Cir.1988).

Grace argues that the pre-1967 policies contains no requirement that the property damage be accidental, unexpected or unintentional. Grace refers to that portion of the endorsement that defines "occurrence" to mean

> either an accident in or a continuous or repeated exposure to conditions which result during the policy period in injury to or destruction of—
>
> (A) Property including the loss of use thereof which is accidentally (sic) caused and
>
> (B) Tangible or physical property, including the loss of use thereof.

Exh. B, tab 5 to Maryland's Memorandum of Law in Support of Motion. Grace points out that sub-part B contains no "accidental" qualification for any claim involving "tangible or physical property" and that a building damaged by its product is tangible or physical property. Maryland disputes that the underlying claims concern "injury to or destruction of . . . tangible or physical property." These claims, if coverage exists at all, says Maryland, would fall under sub-part A, which requires an accidentally caused loss of use. Grace notes, though, that the very endorsements provide for the deletion from the insuring agreement of the words "caused by accident."

In any event, the endorsement also provides that "such insurance as is afforded by this endorsement does not apply to property damage caused *intentionally* by or at the direction of

the insured." *Id.* at tab 5 (emphasis added). Thus, these policies do not provide coverage for intentional property damage.

Turning to the 1967 to 1973 policies, Grace acknowledges that they provide coverage when an occurrence "unintentionally causes injury to or destruction of property." *Id.* at tab 6. Nevertheless, Grace points to the "liberalization" clause in these policies, which provides that when the provisions of the later policies vary from the earlier policies, the insured has the option to have the earlier terms and conditions apply. Since the prior policies contain language providing coverage for unintentional property damage, the liberalization clause has no effect on this issue. Thus, the '67 to '73 policies, like the earlier ones, do not provide coverage for intentional property damage. Thus, Maryland is entitled to summary judgment declaring that it has no duty to indemnify Grace for liability for injuries that were not unintentionally caused.

Even if the policies provide no coverage for intentional injury, Grace argues that Maryland ignores the distinction made by the courts between an intentional act and an intentional injury. *See City of Johnstown, N.Y. v. Bankers Standard Ins. Co.*, 877 F.2d 1146, 1152 (2d Cir.1989). Maryland argues that even under *City of Johnstown*, losses arising from asbestos-related claims against Grace fall outside the coverage because they were not accidental, unexpected or unintended. The relevant issue, as Grace argues, is not whether the policyholder willfully committed the act, but whether the policyholder intended the resulting damage. *Id.* In other words:

> It is not enough that an insured was warned that damages might ensue from its actions, or that, once warned, an insured decided to take a calculated risk and proceed as before. Recovery will be barred only if the insured intended the damages, or if it can be said that the damages were, in a broader sense, "intended" by the insured because the insured knew that the damages would flow directly and immediately from its intentional act.

Id. at 1150 (citations omitted).

Maryland has submitted evidence indicating that Grace knew of the dangers of asbestos as early as 1956. *See* Kerst declaration and documents filed thereunder under seal. For example, Maryland has submitted evidence that Grace was aware of the hazards of asbestos-containing products, and had developed an asbestos-free insulation product, yet continued to sell asbestos-containing Monokote until such sale was prohibited by EPA regulation in 1973. *See* letter from Maryland's counsel, Aug. 8, 1988 and exhibits filed under seal. Maryland has submitted a considerable amount of evidence on this issue. Grace disputes the existence of evidence showing that Grace believed, or that it was generally accepted, that asbestos products, once installed, caused property damage. Maryland, by its evidence, hopes to show that Grace intended the consequences of its actions. This evidence raises factual issues that bar summary judgment for Grace's claim that it is entitled to full and complete defense and indemnification on the triggered policies.

In regard to *Greenville*, though, the court did not consider whether Grace intended to cause the damage alleged in that case. Indeed, in *Dayton Independent School District v. National Gypsum Co.*, 682 F.Supp. 1403, 1408 n. 14 (E.D.Tex. 1988), *reversed on other grounds, sub. nom, W.R. Grace & Co., supra*, the court found that the *Greenville* decision only addressed whether the jury could have properly found that Grace's negligence warranted punitive damages, not whether Grace intended to cause property damage, when it sold asbestos-containing materials. Thus, the *Greenville* jury did not find that Grace intended to cause property damage, the court added. *Id.* We agree with the *Dayton* court's reading of *Greenville*, particularly in view of *City of Johnstown*.

Maryland argues that a distinction should be drawn between policies, like the present ones, that require injury or damage be "unexpectedly cause[d]" and the "expected or intended" language of other policies, which is more inclusive. *See Borg–Warner Corp. v. Liberty Mutual Ins. Co.*, No. 88-539 (Sup.N.Y., Tompkins Co. Jan. 24, 1991), slip op. at 34. Even

though the policies in *City of Johnstown* contained the "expected or intended" language, the ruling there suggests that it would encompass the Maryland policy language. As the Second Circuit said:

> [T]o exclude all losses or damages which might in some way have been *expected* by the insured, could expand the field of the exclusion until virtually no recovery could be had on insurance. This is so since it is mishaps that are 'expected'—taken in its broadest sense—that are insured against.

877 F.2d at 1150 (emphasis in original).

Thus, Maryland's motion for summary judgment is denied concerning *Greenville*.

Punitive Damages

Maryland argues that it has no obligation to indemnify Grace for any judgments awarding punitive damages against Grace or for any sanctions, fines or penalties imposed against Grace. Citing *Public Serv. Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392, 442 N.Y.S.2d 422, 425 N.E.2d 810 (1981), and *Hartford Accident & Indem. Co. v. Village of Hempstead*, 48 N.Y.2d 218, 422 N.Y.S.2d 47, 397 N.E.2d 737 (1979), Maryland notes that New York courts have long held that under no circumstance may an insurer indemnify an insured for punitive damages. These holdings are based on public policy reasons. *Village of Hempstead*, 422 N.Y.S.2d at 51–52, 397 N.E.2d at 741–42. Public policy aside, Maryland argues that its policy language limits coverage to bodily injury or property damages and punitive damages do not fall within either category.

In response, Grace contends that New York law does not control the issue of coverage for punitive damages. In the absence of any choice of law provision in the policies or other countervailing considerations, Grace says, the question of insurability is usually decided by reference to the law of the state that imposed the punitive damages—in regard to the state that imposed the punitive damages—in regard to the *Greenville*

case, South Carolina. In South Carolina, Grace submits, Maryland's policies cover the punitive damage award in *Greenville*. *Carroway v. Johnson*, 245 S.C. 200, 139 S.E.2d 908, 910 (1965). But even in New York, Grace adds, coverage depends on the precise nature of the punitive damage award. Grace submits that an award based on non-intentional or vicarious liability would be covered in New York. *See Village of Hempstead, supra*, 422 N.Y.S.2d at 50, 397 N.E.2d at 740.

The New York Court of Appeals has now resolved the issue. In *Home Ins. Co. v. American Home Products Corp.*, 75 N.Y.2d 196, 551 N.Y.S.2d 481, 484, 550 N.E.2d 930, 933 (1990), that court applied its earlier holdings in *Goldfarb* and *Hartford* to out-of-state judgments. Thus, in New York, public policy prevents an insurer from reimbursing an insured for punitive damages awarded against the insured in an out-of-state judgment. The Court of Appeals also indicated that an award of punitive damages is not limited to intentional conduct but may involve wilful or wanton negligence or recklessness. 551 N.Y.S.2d at 485, 550 N.E.2d at 934.

Grace argues, however, that because of the similarity in the law of Illinois, the state of the underlying judgment, and New York, in *Home Insurance*, it was appropriate to apply New York policy to the Illinois judgment. Under Illinois law, punitive damages "may only be awarded upon a showing that a tort has been 'committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others * * *.' " *Home Insurance Co.*, 551 N.Y.S.2d at 485, 550 N.E.2d at 934 (citations omitted). In South Carolina, the state of the *Greenville* judgment, on the other hand, says Grace, mere gross negligence justifies an award of punitive damages. *Kennedy v. Columbia Lumber & Mfg. Co., Inc.*, 299 S.C. 335, 384 S.E.2d 730, 737 (1989). Because punitive damages may be awarded in South Carolina for conduct less egregious than what would support a punitive award in New York, Grace contends, the reasoning of *Home Insurance Co.* does not apply to the award in *Greenville*.

Nevertheless, the Fourth Circuit in *Greenville* stated that under South Carolina law, "punitive damages may be recovered when a tortfeasor acts willfully, wantonly, or in reckless disregard of the rights of another." *City of Greenville*, 827 F.2d at 983. This language differs very little, if at all, from the language quoted above in *Home Insurance Co.* relating to Illinois law on punitive damages. But even if South Carolina has a less stringent test for an award of such damages, the conduct the jury found Grace guilty of fits with the confines of the "more stringent" Illinois law. *See id.* at 982.[10] In short, the conduct of Grace, as found in *City of Greenville*, would support an award of punitive damages in New York. *Home Insurance Co.*, 551 N.Y.S.2d at 486, 550 N.E.2d at 935. Accordingly, we find that New York public policy prevents Maryland from reimbursing Grace for its actions in *Greenville*. Maryland's motion for summary judgment on this issue is granted. The parties have not submitted any other evidence of awards of punitive damages against Grace, so summary judgment for such awards is premature.

Duty to Defend Upon Exhaustion of Limits

Royal seeks a declaration that any defense obligation it may owe to Grace under its pre–1966 policies will terminate upon the exhaustion of those policies' limits.[11] Maryland joins in

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[10] The Fourth Circuit said:

> We think that the jury reasonably could have concluded from this evidence that Grace knew of the risks associated with asbestos-containing Monokote when it sold the produce to Greenville, and that Grace failed to take reasonable steps to eliminate those risks. The evidence indicated that Grace knew both of the health risks resulting from exposure to asbestos and of the likelihood that the Monokote would release asbestos fibers into the Greenville City Hall because of its failure to bond properly.

827 F.2d at 982.

[11] Grace concedes that the duty to defend ends when the policy limits are exhausted for post–1966 policies. As stated, *see, supra*, note 3, the insurance industry redrafted its standard CGL policy in 1966. The

Royal's request. The defense provisions of the pre–1966 Royal policies sold to Zonolite, Grace's predecessor, provide:

> As respects the insurance afforded by other terms of this policy the Company[Royal] shall:
>
> (a) defend any suit against the Insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent;
>
> * * *
>
> The amounts incurred under the insuring agreement, except settlements of claims and suits, are payable by the Company in addition to the applicable limit of liability of this policy.

Titus 8-21-87 Aff. Exh. 1–3 (Insuring Agreements, II Defense, Settlement, Supplementary Payments).

Royal cites *Commercial Union Ins. Co. v. Pittsburgh Corning Corp.*, 789 F.2d 214 (3d Cir.1986); *Keene Corp. v. Ins. Co. of N.Am.*, 597 F.Supp. 946 (D.D.C.1984), *vacated as a result of settlement*, 631 F.Supp. 34 D.D.C.1985); and *Zurich Ins. Co. v. Northbrook Excess & Surplus Ins. Co.*, 145 Ill.App.3d 175, 98 Ill.Dec.512, 494 N.E.2d 634 (1986), to support its position. Grace counters that since these cases apply Pennsylvania and Illinois law, not New York law,[12] the court should disregard them.

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new language makes clear that the company has no obligation to defend after the liability limits have been exhausted. The 1966 defense obligation clause provides: "[T]he company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements." *See Federal Ins. Co. v. Cablevision Systems Dev. Co.*, 836 F.2d 54, 56 (2d Cir.1987).

[12] Royal notes that New York law governs the interpretation of its policies under which Grace seeks coverage.

The only New York case that addresses the issue, *American Employers Ins. Co. v. Goble Aircraft Specialties, Inc.*, 205 Misc. 1066, 131 N.Y.S.2d 393, 400 (Sup.Ct., N.Y.Co.1954), *appeal withdrawn*, 1 A.D.2d 1008, 154 N.Y.S.2d 835 (1st Dep't 1956), holds that the duty to defend survives the exhaustion of the policy limits.[13] The court there found the language in the policy, "defend any suit against the insured," which also appears in our policies, unambiguous. *Id.* Though Royal argues that *Goble* represents an outdated and minority view, it appears to represent the law in New York.[14] It was cited in *Blasch v. Chrysler Motors Corp.*, 114 Misc.2d 223, 450 N.Y.S.2d 1012, 1016 (Sup.Ct. Albany Co.1982), *rev'd on other grounds*, 93 A.D.2d 934, 462 N.Y.S.2d 313 (3d Dep't 1983), for the proposition that the policy language must be examined to determine if the duty to defend terminates with the insurer's payment of the policy limits. Furthermore, the district court in *Federal Ins. Co. v. Cablevision Systems Dev. Co.*, 662 F.Supp. 1537, 1539–40 (E.D.N.Y.), *aff'd*, 836 F.2d 54 (2d Cir.1987), cited *Goble Aircraft*, and *Blasch* too, to show that the duty to defend is essentially limitless. Consequently, we find under New York law that the duty to defend survives the exhaustion of the policy limits and, hence, deny summary judgment to Royal on this issue.

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[13] Royal notes that *Goble Aircraft* involved a pre–1955 defense obligation clause. Nonetheless, we see no meaningful difference between that clause and the post–1955 clause. The 1966 clause, on the other hand, as noted, *see supra* note 11, makes clear that the defense obligation ceases upon the exhaustion of the indemnity limits.

[14] At present, with regard to automobile insurance policies, New York law—11 N.Y.C.R.R. 60.1, par [b]—requires the insurer to defend after exhaustion of the policy limits. *See Delaney v. Vardine Paratransit, Inc.*, 132 Misc.2d 397, 504 N.Y.S.2d 70, 71 (Sup.Ct. Schenectady Co.1986); *Exchange Mutual Insurance Co. v. Geiser*, 130 Misc.2d 959, 498 N.Y.S.2d 291, 293 (Sup.Ct. Albany Co., 1986).

Limitation of Coverage to Sums Payable as Damages and Limitation of Coverage to Claims for Property Damage

The insurers seek a declaration, with respect to the underlying asbestos-related building cases, that to the extent these suits do not seek damages, no coverage—defense or indemnification—is afforded under their policies. Typically, the policies provide for the defense of suits seeking damages and for indemnification of "sums which the Insured shall become legally obligated to pay *as damages* because of injury to or destruction of property, including the loss of use thereof." *See supra*, n. 3 (emphasis added). The insurers contend that the policies do not provide coverage for suits seeking relief other than damages, such as declaratory or equitable relief. The term "damages", say the insurers, explicitly qualifies both the duty to defend and the duty to indemnify.

Many suits, for example, seek injunctions requiring Grace to test for and remove asbestos-containing materials in school or other buildings. Others seek equitable restitution of costs claimants have incurred to test for and remove asbestos-containing material. And still others seek a declaration that Grace must indemnify the claimants for costs they incur in responding to potential future claims by persons who may be exposed to asbestos-containing materials present in the claimants' buildings.

Needless to say, Grace resists the entry of the requested declaratory judgment. It argues that all the complaints in the underlying case seek damages on account of property damage. But more than that, Grace maintains that damages means money the insured is legally obligated to pay for the results of property damage.

Another related issue concerns the limitation of coverage to claims for property damage. Maryland seeks a declaration that it has no duty to defend or indemnify for school cases that seek recovery for strictly monetary injuries, rather than property damage. This category includes the expense of testing for potential health problems and upgrading school facilities to

preclude future health hazards. These expenses are not incurred, Maryland maintains, because of "property damage."

Grace points out that the underlying complaints allege property damage due to the presence of asbestos-containing materials. Grace also notes that Maryland paid for inspections costs, replacement costs, etc. in the Bituthen and WRDA (construction chemical additive called "WRDA-99", had to do with installation of sub-par WRDA id at 16) claims. It points out, too, that Aetna paid claims for removal and replacement of formaldehyde foam insulation in homes. *Id.* at 21

Courts have reached different results on the term "as damages." The conflict focuses on whether the term is interpreted according to the legal or equitable nature of the liability or to the meaning of the term to the ordinary person. *American Motorist Ins. Co. v. Levelor Lorentzen, Inc.*, No. 88–1994, 1988 WL 112142 at *2 (D.N.J.1988), *appeal dismissed*, 879 F.2d 1165 (3d Cir.1989). The Second Circuit has concluded that New York would afford the term "damages" its ordinary meaning and, hence, remedial costs for the cleanup of a waste site constitute damages. *Avondale Indus. Inc. v. Travelers Indem. Co.*, 887 F.2d 1200, 1207 (2d Cir.1989), *reh'g. denied*, 894 F.2d 498 (2d Cir.) (per curiam), *cert. denied*, 496 U.S. 906, 110 S.Ct. 2588, 110 L.Ed.2d 269 (1990). *Avondale* involved an oil recycling facility and a dump site in Louisiana. Persons residing near the dump site instituted actions for personal injury and property damage caused by pollutants from the site. *Id.* at 1201. In addition, the plaintiff there received a letter from the Louisiana State Attorney General's office, issued at the request of the Louisiana State Department of Environmental Quality (DEQ), indicating that DEQ intended to clean up the waste site at the recycling facility and recover all remedial costs for the cleanup. *Id.* at 1202. The court imposed on the insurer the duty to defend the DEQ proceeding and the private actions, too.

On the damage issue the court said:

> In New York, the terms of an insurance policy have long been accorded "a natural and reasonable meaning, " *Doyle v. Allstate Ins. Co.*, 1 N.Y.2d 439, 443, 154 N.Y.S.2d 10,

136 N.E.2d 484 (1956), corresponding to "the reasonable expectation and purpose of the ordinary businessman." *Ace Wire & Cable Co. v. Aetna Casualty & Sur. Co.*, 60 N.Y.2d 390, 398, 469 N.Y.S.2d 655, 457 N.E.2d 761 (1983); see *Bird v. St. Paul Fire & Marine Ins. Co.*, 224 N.Y. 47, 51, 120 N.E. 86 (1918). If there is uncertainty concerning its meaning, a policy is construed to embrace coverage. *Insurance Co. of No. Am. v. Dayton Tool & Die Works Inc., v. Liberty Mut. Ins. Co.*, 57 N.Y.2d 489, 457 N.Y.S.2d 209, 443 N.E.2d 457 (1982); *Thomas J. Lipton, Inc. v. Liberty Mut. Ins. Co.*, 34 N.Y.2d 356, 361, 357 N.Y.S.2d 705, 314 N.E.2d 37 (1974); accord *National Grange [Mut. Ins. Co. v. Continental Casualty Ins. Co.]*, 650 F.Supp. [1404] at 1408 [(S.D.N.Y.1986)]. When an insurer that drafts the instrument wants to exclude from coverage policy obligations it would otherwise assume, it must do so in clear and unmistakable language. *See Seaboard [Sur. Co. v. Gillette Co.]*, 64 N.Y.2d [304] at 311 [486 N.Y.S.2d 873, 476 N.E.2d 272] [(1984)].

Id. at 1206–07. It noted the policy there did not include any definition of the term "damages". *Id.* at 1207. A number of other cases, the court added, have held that cleanup costs are damages under the same kind of policy.[15] *Id.* Although *Avondale* concerns cleanup costs of toxic waste materials, the two cases the insurers principally rely on, *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chemical Co. Inc.*, 842 F.2d 977 (8th Cir.) (en banc), *cert. denied*, 488 U.S. 821, 109 S.Ct. 66, 102 L.Ed.2d 43 (1988) (*NEPACCO*), and *Maryland Cas.*

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[15] The language of the provision in the CGL policy interpreted in *Avondale* is almost identical to the language of the Maryland–Grace policies. The *Avondale* policy provided that:

> [Travelers] will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as *damages because of* bodily injury or *property damage* to which this policy applies caused by an occurrence.

887 F.2d at 1202 (emphases added).

Co. v. Armco, Inc., 822 F.2d 1348 (4th Cir.1987), *cert. denied*, 484 U.S. 1008, 108 S.Ct. 703, 98 L.Ed.2d 654 (1988),[16] like *Avondale*, involve environmental cleanup costs. Not only that, the insurers argue that the rule they urge—that coverage is afforded only for sums the insured is legally obligated to pay as damages—applies with equal force to asbestos building cases. *See* Reply Memorandum of insurers at 6. Thus, under New York law, the insurers have a duty to defend the building cases, regardless of whether they contain claims for equitable relief or, for that matter, for compliance with orders of regulatory agencies.[17]

The law of the State of Washington, which, according to General governs its policies, provides that response costs incurred under CERCLA are damages within the meaning of CGL policies. *Boeing Co. v. Aetna Casualty & Sur. Co.*, 113 Wash.2d 869, 784 P.2d 507, 516 (1990). Response costs, as defined by CERCLA, include costs of removal of hazardous substances from the environment and the costs of other remedial work. *Id.* 784 P.2d at 509. *Boeing* also held that the "term 'damages' does not cover safety measures or other preventive costs taken in advance of any damage to property." *Id.* 784 P.2d at 516.

Under California law, which, Aetna says, governs its policies issued to California Zonolite, CERCLA cleanup costs are considered damages. *AIU Ins. Co. v. Superior Court (FMC Corp.)*, 51 Cal.3d 807, 274 Cal.Rptr. 820, 842, 799 P.2d 1253, 1275 (1990); *Intel Corp. v. Hartford Accident & Indem. Co.*, 692 F.Supp. 1171, 1186-87 (N.D.Cal.1988); *Aerojet–General*

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[16] The underlying suits in *NEPACCO* and *Armco* were brought by the government, pursuant to the Comprehensive Environmental Response and Compensation and Liability Act of 1980 (CERCLA) (Superfund).

[17] In *American Motorist Insurance Co. v. Levelor Lorentzen, Inc.*, No. 88–1994, 1988 WL 112142 (D.N.J.1988), *appeal dismissed*, 879 F.2d 1165 (3d Cir.1989), the court found that New York's highest court would find that the term "as damages" would encompass the cost of statutorily mandated environmental cleanup costs. (CERCLA) 1988 WL 112142 at *4.

Corp. v. San Mateo Cy. Superior Court, 211 Cal. App.3d 216, 257 Cal.Rptr. 621, 631, *reh'g. denied*, 211 Cal.App.3d 216, 258 Cal.Rptr. 684 (1989).[18]

The Supreme Court of Minnesota has also spoken on this issue. Minnesota law, according to Aetna, applies to the policies issued to Western Mineral. Responding to a certified question from the Federal district court there, the Minnesota Supreme Court found that the costs of complying with directives issued by state and federal environmental agencies to clean up groundwater contamination caused by pollution is covered under CGL policies. *Minnesota Mining & Manufacturing Co. v. Travelers Indemnity Co.*, 457 N.W.2d 175, 184 (Minn. 1990).

Grace notes that the underlying claimants do not seek damage for safety measures taken in advance of injury to property. Rather, these claimants, Grace adds, seek compensatory damages as a result of property damage that, they allege, has already occurred. If that is so, in the states mentioned above—New York, Washington, California and Minnesota—it appears that Grace would be entitled to coverage. Still, a determination must await examination of the underlying claims. Suffice it to say, the insurers' motion for summary judgment is denied.

On the question of coverage for claims for property damage, it appears New York would provide coverage. In *City of New York v. Keene Corp.*, No. 84-44559, slip op. at 7 (Sup.Ct. N.Y. Co. Nov. 19, 1985), *aff'd*, 129 A.D. 2d 1019, 513 N.Y.S.2d 1004 (1st Dep't 1987), the court found that the refitting of the city's buildings, contaminated by asbestos, to make them safe to be the measure of plaintiffs' property damage.

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[18] The *Aerojet* court, like the *Boeing* court, found that damages do not include costs to prevent future pollution. 257 Cal.Rptr. at 635. The California Supreme Court in *AIU Ins. Co.* noted that prophylactic costs—incurred to pay for measures taken in advance of any release of hazardous waste—are not incurred because of property damage. 274 Cal.Rptr. at 846, 799 P.2d at 1279. On the other hand, costs for compliance with injunctions that require remedial and mitigative action constitute damages. *Id.* 274 Cal.Rptr. at 845, 799 P.2d at 1278.

Slip op. at 7-8. Moreover, the Second Circuit has held, under New York law, that consequential or intangible damages—in particular, lost profits—are within the terms of the 1966 revised standard CGL policy insuring for property damage. *Aetna Cas. & Sur. Co. v. General Tire Corp.*, 704 F.2d 80, 83 (2d Cir. 1983).

Other jurisdictions have reached different results. *Compare Mraz v. Canadian Universal Ins. Co. Ltd.*, 804 F.2d 1325, 1329 (4th Cir. 1986) (CERCLA response costs do not constitute property damage) *with AIU Ins. Co.*, 799 P.2d at 1279 (reimbursement of response costs and the costs of injunctive relief under CERCLA and related statutes are incurred because of property damage). Maryland initially relied on the Illinois trial court decision in *United States Fidelity and Guaranty Co. v. Wilkin Insulation Co.*, No. 84-CH-11676 (Cir. Ct. Cook Co. Aug. 14, 1987), which held that claims arising out of the installation of asbestos-containing materials in schools and other public buildings were not claims for property damage. During the pendency of the instant motions, however, the Illinois Appellate Court reversed, holding that the incorporation of such materials in buildings constitutes property damage, which results in the diminution in value of the greater building structure. *United States Fidelity and Guaranty Co. v. Wilkin Insulation Co.*, 193 Ill.App.3d 1087, 140 Ill.Dec. 907, 550 N.E.2d 1032 (First District, Fourth Division 1989), appeal filed, 140 Ill.Dec at 912, 550 N.E.2d at 1037. The court added that diminution in value was not property damage. *Id.* Rather, the incorporation of the defective product constituted property damage. *Id.* As a result, the court held that the insurers had a duty to defend. As for a duty to indemnify, the court found a determination on that issue premature since the underlying complaints had not been adjudicated. *Id.* 140 Ill.Dec. at 916, 550 N.E.2d at 1041.

In any event, as noted, it appears under the law of New York, and California, Grace would be entitled to coverage. Thus, for those states, the insurers' motion for summary judgment on this issue is denied.

Trigger of Coverage for Public Building and School Claims

Next, the parties disagree about the trigger of coverage for property damage claims.[19] Grace argues for a continuous trigger theory or exposure theory. Under its view, all policies in effect from installation to removal or containment provide coverage. Maryland, on the other hand, urge a manifestation trigger. Property damage, to Maryland, occurs on the date of discovery or manifestation. To trigger coverage, under this theory, the discovery of damage must occur during the policy period. Some courts have adopted the continuous trigger, *see, e.g., Broderick Inv. Co. v. Hartford Accident & Indem. Co.*, 742 F.Supp. 571 (D.Colo.1989), relying on *Dayton Independent School District v. National Gypsum, supra*, 682 F.Supp. at 1410, *rev'd sub. nom., W.R. Grace & Co.*, 896 F.2d 865, 876 (finding that New York law squarely conflicts with the continuous trigger theory applied by the district court or at least is not settled); *New Castle County v. Continental Casualty Co.*, 725 F.Supp. 800, 813 (D.Del.), *motion for reconsideration denied*, 728 F.Supp. 324 (D.Del.1989); *Lac D'Amiante Du Quebec Ltee. v. American Home Assur. Co.*, 613 F.Supp. 1549, 1561 (D.N.J.1985), *vacated on other grounds*, 864 F.2d 1033 (3rd Cir. 1988), and others have adopted the manifestation trigger. *See, e.g., Mraz v. Canadian Universal Ins. Co., Ltd.*, 804 F.2d 1325, 1328 (4th Cir.1986); *Pittsburgh Corning Corp. v. Travelers Indem. Co.*, No. 84-3985, slip op. at 4, 1988 WL 5296, 1988 U.S. Dist. Lexis 634 (E.D.Pa. Jan. 28, 1988), *adhered to on reconsideration*, (E.D.Pa. March 15, 1988) ("While a 'continuous trigger' theory may be used in order to remedy physical injury or disease caused by asbestos in the past, injury to property does not occur until it is discovered and the market value of the prop-

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[19] Royal takes no position on the trigger of coverage for property damage cases. Royal agrees to be bound by whatever trigger of coverage the court endorses.

Aetna argues against the continuous trigger. We do not address this issue in regard to Aetna until its policies have been proven.

erty drops."); *United States Gypsum Co. v. Admiral Ins. Co.*, No. 83-L-53328 (Ill.Cir.Ct, Cook Co., Jan 7, 1991), slip op. at 6685) (*"U.S. Gypsum"*) ("Property damage is an economic matter for the most part. Personal injury may take place, as medical evidence will support, well before actual detection. Property damage, as a practical matter, does not take place until the damage is known or recognized.")

Maryland cites a recent case from the Eleventh Circuit that applied New York law and rejected the exposure theory. *Young v. Insurance Co. of North America*, 870 F.3d 610, 611 (11th Cir.1989). In that case, Young, a builder, was sued by a purchaser of one of his homes as a result of a fire caused by the faulty installation of a gas grill during construction. Young asked the insurer to defend him in the suit, pursuant to his general contractor liability policy in force at the time of construction. The insurer refused because the coverage had expired before the fire.

Young argued that the term "occurrence" in the policy should be interpreted to include exposure of the property to a hazardous condition—the faulty gas grill—during the policy period. The court rejected Young's argument, noting that the definition of property damage in the policy stated that it covers injury occurring during the policy period. *Id.*[20] This case does not mean, however, that New York rejects the exposure theory on facts like ours. The *Young* court expressly excluded from its rationale cases involving exposure during the policy period to material such as asbestos. In those cases, the court said, exposure to asbestos could be deemed an injury under the policy, even though the outward signs of that injury did not appear until after the policy had expired. *Id.* at 612. The court distinguished between asbestos cases where exposure

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[20] *Greenlee v. Sherman*, 142 A.D.2d 472, 536 N.Y.S2d 877 (3d Dept.1989), cited by Maryland, and just like *Young*, held that an insurer need not provide coverage for injury sustained after the expiration of the policy period (a fire) as the result of a condition created during the policy period (the alleged negligent installation of a furnace that caused the fire). 536 N.Y.S.2d at 881.

results in injury that is not readily apparent and those cases where no injury occurs until a specific event, like the fire in *Young* caused by the faulty installation of the gas grill. *Id.* Thus, *Young* does not support Maryland's position. On the other hand, in excluding asbestos from its rationale, the court relied on *Keene*, which, as discussed, has been undermined by *Abex*, See supra at 1212–1213. Thus, *Young* does not help Grace either.

Nevertheless, though the Fifth Circuit in *W.R. Grace & Co.* observed that the law in New York may be unsettled on this question, it cited *American Motorist Ins. Co. v. Levelor Lorentzen, Inc.*, No. 88–1994, 1988 WL 112142 (D.N.J.1988), *appeal dismissed*, 879 F.2d 1165 (3d Cir.1989), which looking to New York law held that: "In the context of damage to property caused by contamination from hazardous waste the 'first discovery' principle is the most appropriate standard to apply . . . Slip op. at 9–10." *W.R. Grace & Co.*, 896 F.2d at 876. *Levelor* recognized that no clear precedent exists under New York law for either the time of injury or the first discovery standard. *Levelor*, *supra*, 1988 WL 112142 *4. But given the long periods of time involved and the difficulty of measuring the exact time that damage to property from pollution might occur, the court applied the discovery trigger because it "provides more certainty for insurance carriers in determining potential liability."[21] *Id.* The difficulty in measuring the exact time that damage to property occurs in pollution cases applies as well to asbestos. Consequently, we see no reason to depart from the reasoning in *Levelor*.

If we had any doubt about following *Levelor*, we take heart from the recent rejection of some of the authority cited by

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[21] The California Supreme Court also adopted this reasoning in *Prudential–LMI Comm. Ins. v. Superior Court of San Diego County*, 51 Cal.3d 674, 274 Cal.Rptr. 387, 400, 798 P.2d 1230, 1246 (1990) in a first-party damage case (no third-party liability claims). Quoting from *Home Ins. Co. v. Landmark Ins. Co.*, 205 Cal.App.3d 1388, 1395-96, 253 Cal.Rptr. 277 (1988), the court said: "the manifestation rule in the first party context 'promotes certainty in the insurance industry and allows insurers to gauge premiums with greater accuracy . . .' " *Id.*

Grace.[22] Accordingly, we find that New York would adopt the discovery trigger for property damage claims. Thus, Maryland's motion for summary judgment, which seeks a declaration that it has no duty to defend or indemnify Grace for school asbestos cases in which the damage was discovered after the policy periods, is granted.

Exclusion for Insured's Own Product

Maryland seeks summary judgment declaring that it has not duty to indemnify or defend Grace for liability for school asbestos cases to recover for damage to Grace's products. This dispute concerns the "own product" exclusion. As its name implies, this exclusion bars coverage for property damage to Grace's own products.[23] "The exclusion is premised on the understanding that liability policies are not intended to provide coverage for faulty workmanship, but rather for dam-

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[22] For instance, the Fifth Circuit has reversed the district court in *W.R. Grace & Co.*, 896 F.2d at 877. *In California Consolidated Proceedings (Phase V-A)*, slip op. at 24, the court withdrew its initial adoption of the continuous trigger for property damage. *Asbestos Insurance Coverage Cases*, No. 1072 (Cal.Super.Ct. Jan. 24, 1990) (Statement of Decision Concerning Phase V-A Issues), slip op. at 15-16 ("Because property damage from ACBM [asbestos-containing building material] is not always continuous, the Court cannot adopt a comprehensive 'continuous trigger' approach as to which policies owe a duty to defend in the building cases." Further, in *Lac D'Amiante Du Quebec.*, though the Third Circuit vacated the district court's opinion, relied on by Grace, on absentation grounds, it observed that "the risk is not insubstantial" that the New York courts would adopt a different test concerning the continuous trigger theory given the conflict of authority on the issue and its difficulty. 864 F.2d at 1046.

[23] Specifically, the exclusion provides that the policies do not apply:

> to injury to or destruction of (1) property owned by the insured, (2) any goods, products or containers thereof manufactured, sold, handled or distributed, or premises alienated by the named insured, or work completed by or for the named insured, out of which the accident arises.

Keating affidavit ¶ 10.

age which an insured's product visits upon other property." *Carey Canada, Inc. v. Aetna Casualty & Surety Co.*, No. 84-3113, slip op. at 29 (D.D.C. March 31, 1988). These policies do not operate as performance bonds. *Parkset Plumbing & Heating Corp. v. Reliance Ins. Co.*, 87 A.D.2d 646, 448 N.Y.S.2d 739, 740 (2d Dep't 1982); *Carey Canada*, slip op. at 29. Nor are they a warranty for the insured's products. The policies, however, provide coverage when an insured's product damages property owned by a third party. *Carey Canada*, slip op. at 29.

Maryland argues that the costs of removing and replacing Grace's products are not covered by Maryland's polices. Maryland also challenges Grace's contention that the own products exclusion does not apply when the product is incorporated into a larger entity.

Carpole's Inc. v. Insurance Co. of North America, 544 F.Supp, 6, 7 (D. Minn. 1982), upon which Maryland relies, does not resolve the dispute. In *Carpole's*, a declaratory judgment action, where the underlying suit involved the sale of fertilizer in defective and leaking containers to a customer of Carpole's, the court found that the loss of fertilizer and clean-up and removal costs fell under the exclusion. Maryland focuses on the finding that removal of the defective product came under the exclusion. In that case, however, the defective product had not been incorporated into a larger entity. Also, Carpole's concerned damage to the policyholder's product.

Maryland cites *Advanced Refrigeration & Appliance Co. v. Insurance Co. of North America*, 42 A.D.2d 484, 349 NY.S.2d 195 (3d Dep't 1973) and *Zandri Construction Co., Inc. v. Fireman's Ins. Co.*, 81 A.D.2d 106, 440 N.Y.S.2d 353 (3d Dep't), *aff'd*, 54 N.Y.2d 999, 446 N.Y.S.2d 45, 430 N.E.2d 922 (1981), to show that New York applies the own product exclusion and, thus, precludes recovery for damage to the insured's own product. In those cases, as in *Carpole's*, the plaintiffs sought coverage for defects in their own products or, more particularly, for defects in their own workmanship.

Thus, in *Advanced Refrigeration*, the plaintiff installed a refrigeration system at a resort hotel that allegedly failed to function. In *Zandri*, the plaintiff, a general contractor, erected a church and two years later was sued by the owners of the church for defective work product. The church claimed that Zandri failed to construct the building according to the plans and specifications, to use materials set forth in those plans and to perform labor in a workmanlike manner, thus rendering the building unsafe. 440 N.Y.S.2d at 354. In the present case, by contrast, the underlying claimants are not suing for defects in Grace's own products. They do not contend that Grace's products fail to provide fireproofing or soundproofing. *See Dayton*, 682 F.Supp. at 1412. They seek damages for injury to their buildings because of the presence of asbestos. *See id.* Their claims allege damage to other property into which Grace's products have been incorporated. The own products exclusion does not apply to such claims. *Carey Canada*, slip op. at 31; *see also U.S. Gypsum*, slip op. at 6723.

In sum, the exclusion does not apply where Grace's products are alleged to have caused damage to property owned by others. *Carey Canada*, slip op. at 31. On the other hand, the exclusion would apply if the underlying claimants allege that Grace supplied defective or faulty asbestos. *Id.* It appears that the underlying cases would allege that Grace's products caused damage to the property of others. But since the resolution of this issue depends of the facts of the underlying cases, *id.* at 27, summary judgment is inappropriate.

Sistership

The next dispute, between Grace and Aetna, concerns the "sistership" exclusion.[24] Aetna argues that this provision is

[24] The sistership exclusion provides:

This exclusion bars coverage for damages claimed for the withdrawal, inspection, repair, replacement, or loss of use of the insured's products or work completed by or for the insured or of any property of which such products or work form a part, if such

potentially applicable to asbestos building cases and raises material issues of fact. Neither side has set forth any factual allegations concerning the sistership provision, so summary judgment may be inappropriate. Nevertheless, the arguments submitted by the parties and the limited factual presentation suggests that this provision does not bar coverage. "The provision is intended to exclude from coverage the cost of preventative or curative action by withdrawal of a product in situations in which a danger is to be apprehended." *Todd Shipyard Corp. v. Turbine Service, Inc.*, 674 F.2d 401, 419 (5th Cir.), *cert. denied*, 459 U.S. 1036, 103 S.Ct. 447, 74 L.Ed.2d 602 (1982). On the other hand, the provision does not exclude coverage for "damages caused by the very product whose failure to perform properly aroused apprehension about the quality of 'sister' products." *Id.* To the extent, then, that the underlying claims allege damage to property other than to Grace's products, the exclusion does not preclude coverage. *Carey Canada*, slip op. at 31-32. In addition, the exclusion does not apply because it appears that Grace did not withdraw its product. *Id.* at 32; *Wilkin*, 140 Ill.Dec. at 914, 550 N.E.2d at 1039; *U.S. Gypsum*, slip op. at 6722-23. If, on the other hand, Grace did withdraw its product, in those instances the exclusion may apply. In any event, as with the own products exclusion, summary judgment is not appropriate.

The foregoing considerations apply to the business risk exclusion.[25] The parties have made no factual record yet it

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products, work or property are withdrawn from the market or from use because of any known or suspected deficiency therein.

Aetna's Response Memorandum at 50, n. 58.

[25] This provision excludes:

> [P]roperty damage resulting from the failure of the named insured's products . . . to perform the function or serve the purpose intended by the named insured, if such failure is due to a mistake or deficiency in any design, formula, plan, specifications, advertising material or printed instructions prepared or developed by any insured; but this exclusion does not apply to . . . property damage resulting from the active malfunctioning of such products . . .

Aetna's Brief at 51 n. 60.

appears that this exclusion, too, does not bar coverage. This exclusion seems similar to the own products exclusion. As mentioned before in connection with that exclusion, the underlying claimants presumably have not alleged that Grace's products failed to perform their intended function. But because of the absence of factual record, summary judgment, again, is not appropriate.

Special Limits Provisions in Maryland's Policies

The next dispute concerns the special limits provisions in Maryland's policies issued between 1962 or 1963 and 1973. Although Maryland denies that most of the school cases involved insured property damage, should the court find otherwise, Maryland seeks to limit its liability by the special dollar limits in the Maryland-Grace policies. The special limit endorsement provides:

> The company's limits of liability for injury to or destruction of property arising from gradual pollution or the continuous discharge, leakage or overflow of smoke, fumes, waste or other materials, shall be:—
>
> $25,000. each occurrence
> $25,000. aggregate.

Exh. B to affidavit of Thomas J. Bell, Jr., sworn to January 5, 1990.[26]

Maryland notes that its policies with Grace from 1962 to 1973 provide for a total limit of $725,000 for suits falling within the special limits provision. Maryland paid $725,000 pursuant to the special limit provision in *Water Supply District of Acton v. W.R. Grace & Co.*, Civil Action No. 81-710-G (D.Mass.). In *Water Supply*, a third-party suit filed against Grace, the plaintiff sought recovery from Grace for injuries

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[26] The 1961-62 policy excluded liability for the injury described in the text. The manuscript policy in effect between 1967 and 1973 limited liability to $100,000 for each occurrence and in the aggregate.

arising from the continuous discharge of material from a Grace chemical plant in Acton, Massachusetts. Without admitting that any coverage exists under its policies for the *Acton* suit, Maryland argues that its December, 1989 payment of $725,000 plus interest to Grace exhausted the special limits in all policies from 1962 to 1973. Thus, Maryland seeks summary judgment on this issue.

The special limit endorsement, negotiated by the parties, is unique to the Maryland-Grace policies and no case has interpreted it. For that reason, Maryland objects to Grace's use of the term "pollution exclusion clause" to describe the special limits endorsement. Nonetheless, Grace, responding to Maryland's argument, cites cases that interpret the common "pollution" exclusion provisions contained in standard CGL policies.[27] *See, e.g., Grinnel Mut. Reinsurance Co. v. Wasmuth*, 432 N.W.2d 495, 497-500 (Minn.Ct.App.1988) (pollution exclusion does not apply to damage caused by formaldehyde foam insulation); *Wilkin*, 140 Ill. Dec. at 913, 550 N.E.2d at 1038 (relying on *United States Fidelity & Guaranty Co. v. Specialty Coatings Co.*, 180 Ill.App.3d 378, 129 Ill. Dec. 306, 535 N.E.2d 1071 (1989), which found the exclusion clause ambiguous, construed it against insurers and also found exclusion applicable to active polluting conduct or where polluting was expected and intended, held that given lack of evidence that insured's conduct was either expected or intended, exclusion no bar to coverage); *National Grange Mut. Ins. Co. v. Continental Cas. Ins. Co.*, 650 F.Supp. 1404,

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27 The usual pollution exclusion clause provides:

> This insurance does not apply . . . to bodily injury or property damage arising out of of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

1410-11 (S.D.N.Y.1986) (Weinfield, J.), (usual pollution exclusion applies to damage caused intentionally).[28]

Maryland points out that throughout this litigation, Grace has asserted that the school cases involve property within the meaning of the Maryland-Grace policies. Grace has also argued, says Maryland, that the school asbestos cases involve a "continuous" occurrence. Thus, Maryland submits, these cases come under the "continuous discharge" aspect of the gradual pollution clause. Maryland adds that the usual pollution exclusion clause permits coverage for sudden and accidental pollution as opposed to gradual pollution or continuous discharge of other material such as asbestos. Finally, Maryland urges that the plain meaning of the exclusion controls. To Maryland, the clause broadly encompasses the discharge of "other material" besides those illustrative substances (smoke, fumes and waste) listed and clearly applies to asbestos fibers.

Grace argues that the underlying cases are product-liability cases and, thus, do not allege industrial pollution. Grace also submits the affidavit of an officer of the insurance broker who assisted in the negotiations for the policies, who says that special limit endorsement was intended to apply only to certain claims concerning industrial pollution, and not to claims such as the underlying asbestos related claims. Affidavit of Thomas Keating at ¶ 9.

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[28] The parties also cite more recent cases interpreting the unusual pollution exclusion in connection with asbestos. Maryland cites *Great Northern Ins. Co. v. Benjamin Franklin Federal Savings and Loan Association*; 793 F.Supp. 259 (D.Or.1990), which held the pollution exclusion clause excluded solid irritants and found asbestos a solid irritant. 793 F.Supp at 263; *see also Hanawalt v. Belle City Heating & Sheet Metal, Inc.*, No. 88-Civ-2317 (Wis. Cir. Ct, Recibe County, Feb. 19, 1990).

Grace relies on *Outer Cole v. Celotex Corp.*, No. 87-6170 (14th Judicial Dist., La. Feb. 15, 1990), which found "the release of asbestos particles into the air during the installation, handling, and removal of insulation products was not an act of pollution within the contemplation of the average person." Mealey's Litigation Reports (March 13, 1990) at 2.

The affidavit of Thomas Keating does not create a factual issue. Even though, as Grace notes, the affidavit remains uncontested, it is too conclusory and thus insufficient under Rule 56(e). *See Industrial Risk Insurers v. Creole Production Servs., Inc.*, 568 F.Supp. 1323, 1325 (D.Alaska 1983), *aff'd*, 746 F.2d 256 (9th Cir. 1984).

Nevertheless, the special limits clause does not, as Maryland urges, broadly encompass asbestos under the term "other materials." We find the language of the provision ambiguous at least with regard to asbestos. It is true, as Maryland argues, that the provision differs from the general pollution exclusion clause in that it applies to gradual pollution and continuous discharge. And, of course, the special limits clause contains no "sudden" and "accidental" language. Yet nothing in the provision suggests that asbestos falls within its terms. One would not usually associate asbestos with the substances listed in the exclusion, namely, smoke, fumes or waste. *See Outer Cole*, at 2. Those substances bear a closer relation to industrial pollution, the usual subject of the ordinary pollution exclusion. *See, e.g., Grinnell*, 432 N.W.2d at 498. Even application of the doctrine of *ejusdem generis* suggests that asbestos does not come within the clause's intent. Recently, a trial court in Illinois held the usual exclusion inapplicable to asbestos because the product was "alleged to have caused contamination in a building as opposed to environmental contamination." *U.S. Gypsum, supra*, slip op. at 6729. The *U.S. Gypsum* court also said that "asbestos contamination of a building is not pollution as that word is commonly understood." *Id.* at 6730. Whatever the applicability of the usual pollution clause, we cannot find, as a matter of law, that the special limits provision applies to asbestos. Accordingly, Maryland's motion for summary judgment on this issue is denied.

Proof of Existence of Terms of Policies

Maryland seeks summary judgment declaring it has no duty to indemnify or defend Grace for periods as to which the exis-

tence and terms of Maryland-Grace policies have not been proven by clear and convincing evidence. The other insurers seek similar relief. In regard to Aetna, as indicated, neither side has produced any of that company's policies. Grace contends that it has substantial secondary evidence that Aetna sold CGL insurance in the 1950's and 1960's to three companies subsequently acquired by Grace. See Posner June 1, 1987 affidavit ¶¶ 9-10. That evidence will be explored at a hearing to determine the existence and terms of Aetna's policies. Thus, Grace has not moved for summary judgment against Aetna, nor have any of the insurers. Maryland, though, has moved for apportionment of defense costs between all the carriers, including Aetna, to the extent Grace is able to establish that Aetna afforded responsive coverage. Aetna appears on a contingent basis—contingent upon proof of its policies. Its participation does not amount to a concession that it issued coverage to any of Grace's predecessors.

Grace has the burden of establishing the existence of coverage under New York law. *Abex,* 790 F.2d at 129-30 (citing *Emmons Indus., Inc. v. Liberty Mut. Fire Ins. Co.,* 545 F.Supp. 185, 188 (S.D.N.Y. 1982)). Maryland acknowledges that it issued policies to Grace for the years 1961-63. But for those policies, Maryland says, Grace has failed to establish their terms and conditions. As for pre-1961 policies, Maryland contends that Grace has failed to prove their existence.

With respect to the policies from 1963 to 1973, Grace has produced the policies. Indeed, Maryland notes that Grace has produced certain policy pages that been lost or missing from Maryland's files. Nevertheless, Maryland says it is unable to state that Grace has produced every provision of the policies since Maryland does not have copies of the policies. Grace has done all that it could to show the existence of these policies. It has satisfied its burden. The burden now shifts to Maryland to show that less than full policies were produced, a burden it has not meet. Thus, for the purposes of this litigation only, we find that Grace has made the required showing for the 1963-73 policies.

Of the 1963–73 policies, the 1967–70 policy requires further comment. For that policy, Maryland points out that neither party has produced a signed declarations page. The declarations page, however, unlike other declaration pages, contains no signature line. *See* Exh. A to the letter of Grace's counsel, dated 12–20–90. Nor, as Grace argues, does the page give any indication that a signature is necessary or expected.

Grace has also submitted the affidavit of Jeffrey Posner, its Assistant Claims Manager, who has responsibility for insurance coverage concerning the asbestos-related bodily injury and property damage claims pending against Grace. He asserts that Grace expended substantial premiums to purchase CGL policies from Maryland, including, among others, the 1967–70 policy. *See* Posner 6–1–87 affidavit at ¶ 2. In addition, Grace submitted the affidavit of the broker for the Maryland–Grace policies. He describes the terms of the 1967–70 policy, among others. *See* Keating 8–31–89 affidavit at ¶ 3. Thus, Grace had made a sufficient showing for summary judgment on the existence of the 1967–70 policy.

In regard to the other insurers, it appears Royal has conceded the existence of three policies, and General concedes four. But others have not been proven. A hearing will be held on the policies that Grace has not proven on this motion.

Coverage for Subsequent Acquisitions

Maryland argues that its policies in force before Grace's acquisition of, or merger with, asbestos-manufacturing companies do not provide coverage for any asbestos-related suit against Grace. Prior to April, 1963, Grace had no asbestos-related activities. Maryland seeks summary judgment declaring if has no duty to defend or indemnify Grace under pre–1963 policies.

In 1963, Grace started acquiring asbestos-manufacturing companies.[29] Maryland provided coverage to Grace before

[29] The companies that Grace merged with or acquired include Zonolite, California Zonolite, Vermiculite–Northwest, Western Mineral, Texas Vermiculite Company, Ari–Zonolite and Tennessee Zonolite Com-

1963, but maintains that its coverage cannot apply to liability arising from asbestos-related products at that time because of Grace's lack of involvement with such products. Maryland notes it did not insure asbestos-related activities. Liability insurance, Maryland submits, covers only the business specified in the policy and does not cover a subsequently acquired, distinct and separate business. To provide such coverage, Maryland says, would amount to a windfall of coverage for which no premium could possibly have been charged. As an example of the windfall, Maryland submits that accepting Grace's argument would mean that Grace could acquire the Johns–Manville Corporation and if claimants sued Grace as the successor of Johns–Manville, the bankrupt Manville Trust would again be funded through Maryland's policies. Maryland adds that Grace prior to 1963 could have no liability for asbestos related activities because it had no such activities. Thus, Grace at that time had no insurable interest in the later acquired companies, says Maryland.

Grace counters that the policy language means that Grace is covered for liability it incurs because of an injury during the policy period, regardless of who owned or produced the instrumentality of that injury. The acquisition of the company that manufactured asbestos, to Grace, is not the event that triggers coverage. Coverage is triggered, Grace adds, by the alleged continuous injury or property damage process upon which its liability is based. Grace does not dispute that it has

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pany. The mergers and acquisitions took place over a several year period. Maryland notes that only after consummating the various acquisition and merger agreements did Grace seek coverage from Maryland for the newly acquired companies and in some cases Grace apparently waited until several years after the acquisition or merger to arrange for coverage.

The earliest acquisition of Zonolite, took place in 1963. Maryland says that documentary evidence, *see* Agreement and Plan of Reorganization Between W.R. Grace & Co. and Zonolite Company, Section 3(ii)(a) (January 17, 1963) (Exh. C, Tab 2 to Maryland's Memo in Support), suggests that Grace intended to rely on Zonolite's existing coverage to respond to potential claims. Grace, however, points to an endorsement to Maryland's 1963 policy adding Zonolite to the "named insured" endorsement.

no liability for pre–1963 asbestos activities. Nonetheless, if it is sued for such activities, rightly or wrongly, it claims Maryland owes it a defense at least. Grace also points to an endorsement to the Maryland policy that provides:

> In consideration of an additional premium to be determined, it is agreed that such insurance as is afforded by the policy shall apply to the name insured and any newly formed or newly acquired subsidiaries, divisions and companies coming under the control and active management of W.R. Grace & Co.

Keating Aff. ¶ 12. As a result of this endorsement, Grace submits that the pre–1963 policies apply to liabilities arising out of the subsequent acquisition by Grace of the Zonolite entities.

The endorsement, however, by its term, does not provide automatic coverage. It applies only if additional premiums are paid. For pre–1963 policies, Grace has not presented any evidence, as Maryland argues, that the amount of the additional premium for expanded coverage was ever determined, much less paid.

Nevertheless, Grace is not seeking coverage for claims against its acquired companies. Grace seeks coverage for claims against it directly. Grace asserts that the underlying claimants seek to hold it liable for pre-acquisition injury. The claimants make allegations of damage, says Grace, during the pre–1963 policy period. In effect, however, Grace seeks coverage for its acquisitions. As indicated, Grace had no involvement with asbestos before 1963. Its status as a defendant in the relevant underlying cases necessarily arises from its acquired companies. Maryland did not insure Grace for the pre-acquisition activities of those companies. *See State of Idaho v. Bunker Hill Co.*, 647 F.Supp. 1064, 1077–78 (D.Idaho 1986). In *Bunker Hill*, the liability coverage of an insured, Gulf, lapsed three weeks prior to its merger with Bunker Hill in which Bunker Hill became the wholly-owned subsidiary of Gulf. *Id.* at 1077. The court rejected Gulf's

argument that the insurer assumed the liabilities of Bunker Hill before the merger. *Id.* Even though the plaintiff sought relief from Gulf for the time period when the policies were in effect, the court found that the plaintiff's claim had no arguable basis against Gulf and, thus, dismissed the action against the insurer. *Id.* In the present case, as in *Bunker Hill*, the underlying claimants seek relief from Grace for the time period when the Maryland policies were in effect, but before the merger. Grace had no relationship with the claimants before the merger. *See id.* Any injury to a claimant occurred before Maryland came on the risk. Consequently, Maryland has no duty to defend or indemnify.

Another case relied on by Maryland supports its position, even though, as Grace notes, the decision in that case consists only of a three page summary order. *See International Minerals & Chemical Co. v. Liberty Mutual Ins. Co.*, No. 84 L 50979 (Ill.Cir.Ct., Cook Co., Mar. 7, 1985). In that case, the court dismissed claims against insurers, each of which issued policies to the insured that expired before the insured acquired the facility that was the subject of the underlying lawsuit.

Lastly, the difficulty of this issue is multiplied by Grace's argument for a continuous trigger for both bodily injury and property damage cases. Since we have rejected the continuous trigger theory, part of Grace's position is open to question.

Accordingly, Maryland's motion for summary judgment is granted on this issue. On the other hand, if Grace can show that the claimants seek relief for Grace's own activities, Maryland would owe it a defense and provided Grace can show proof of coverage.

In regard to coverage after 1963, Maryland argues that Grace has failed to carry its burden of showing when coverage was obtained for each asbestos-related acquisition and therefore cannot be granted summary judgment. Maryland does not seek summary judgment on this issue. When Grace acquired the Zonolite Company in 1963, an endorsement inserted the "Zonolite Division" as an additional insured in

the Maryland policies. Other companies acquired by Grace were added to these policies as insureds after 1963. *See* Exh. B to August 8, 1988 letter from Maryland's counsel. However, even after Grace acquired the asbestos companies, Maryland notes, Grace waited years in some cases to change the coverage for an acquired company from the previous carrier to Maryland. Maryland submits that Grace has the burden of showing when each of the acquired companies was brought under Maryland's policy coverage.

Grace argues that it has satisfied that burden. It has submitted copies of dated endorsements or declarations indicating coverage. *See, e.g.*, exhibits to letter of Grace's counsel, dated Jan. 25, 1991. Maryland responds that the presence of conflicting evidence as to the dates of these endorsements prevents summary judgment. In addition, because of recent submissions by Grace, Maryland has submitted an affidavit, pursuant to Rule 56(f), indicating its need to gather and present evidence regarding the dates and percentages of interests acquired by Grace in Zonolite and the other companies.

Grace has submitted copies of documents attempting to show dates of coverage: an endorsement adding the Zonolite Company as a "named insured" for the policy period 6–30–62 to 6–30–63; a declaration on a CGL Schedule listing Texas Vermiculite Co. effective 1-22-66; a declaration on a CGL Schedule for Vermiculite Northwest with a date of 9-15-66; a declaration on a CGL Schedule for California Zonolite, effective 9-14-66, a declaration on a CGL Schedule for Western Mineral with a date of 12–29–66, a schedule for Ari–Zonolite, effective from 6–30–69 to 6–30–70. *See* exhibits to letter of Grace's counsel, dated January 25, 1991.

Maryland questions the authenticity of these documents. It asserts that these documents were produced by Grace. Maryland also contends that it has produced evidence that contradicts these documents. The evidence that Maryland has submitted, though, does not appear to contradict Grace's documents. For example, Maryland has produced evidence that shows that Grace canceled its coverage with Aetna for

Ari–Zonolite on January 1, 1970. *See* Exh. C, tabs 6, 7 to Maryland's Memo in Support of Motion. Maryland points to the declaration, produced by Grace, which shows that Maryland provided coverage for Ari–Zonolite from June 30, 1969. One explanation for this inconsistency is that Grace could have opted for additional coverage during the six months between June 30, 1969 to July 1, 1970. More than that, a memo, Maryland submits, reflecting the addition of Texas Vermiculite, effective January 1, 1966, to the Maryland policy, *see* exhibits to Maryland's counsel's letter, dated August 31, 1988, supports, rather than contradicts, the schedule concerning Texas Vermiculite as to the effective date of coverage. Nevertheless, it appears that the documents that Grace offers to show dates of coverage for its acquired companies, have not been authenticated. Rule 56(e) requires that the evidence considered on a summary judgment motion be admissible evidence. Under the circumstances, these documents cannot form the basis for summary judgment. Accordingly, Grace's motion for summary judgment is denied.

Policies issued to predecessors (Identity of the insured)

We turn to yet another area of dispute—the extent to which the insurers have a duty to defend and indemnify Grace in the underlying suits against Grace with respect to policies the insurers issued to Grace's predecessor companies. This issue concerns Royal, Aetna and General, all of whom have moved for summary judgment declaring that they have no duty to defend Grace. In brief, these insurers argue that Grace must show that their policy holder's products are implicated in the underlying actions. Grace contends it has satisfied its burden by showing that these actions were brought in the geographic areas where the products of the predecessor companies were distributed.

The cases the parties cite indicate that a surviving corporation, after a merger, by operation of the state merger statute, is vested with the rights and benefits belonging to any of the merged corporations. *See Chatham Corp. v. Argonaut Ins.*

Co., 70 Misc.2d 1028, 334 N.Y.S.2d 959, 961 (Sup. Nassau Co.1972); *Imperial Enterprises, Inc. v. Firemen's Fund*, 535 F.2d 287, 291 (5th Cir.), *reh'g denied*, 540 F.2d 1085 (5th Cir.1976); *Brunswick Corp. v. St. Paul Fire & Marine Ins. Corp.*, 509 F.Supp. 750, 753 (E.D.Pa.1981); *Paxton & Vierling Steel Co. v. Great American Ins. Co.*, 497 F.Supp. 573, 578 (D.Neb.1980). "In other words, the surviving corporation simply stands in the same position as that occupied by the merged corporation prior to the merger." *Brunswick*, 509 F.Supp. at 753.

Thus, in *Chatham*, the court held that an insurer had a duty to defend a corporation that merged with an insured even if the insured was not named in the underlying complaint. 334 N.Y.S.2d at 961. There, a Mrs. Gerdes sued the manufacturer of a ladder for injury she sustained as a result of the collapse of the ladder. The manufacturer impleaded Chatham claiming that Chatham supplied a defective component of the ladder. Chatham sought a defense and indemnification from the defendant insurance company that issued coverage to the Duraluminum Ladder Mfg. Co., which, after the injury, merged with Chatham. The manufacturer did not name Duraluminum in the third-party suit.

Nonetheless, the court said that "any right lawfully belonging to any of the constituent corporations merged together can be asserted by the surviving corporation." 334 N.Y.S.2d at 961 (citation omitted). The court also noted that the obligation to defend is determined from the allegations of the complaint.[30] *Id.* Although Duraluminum was not named in the pleadings, the bill of particulars claimed that the alleged defective parts were purchased from that company and sufficiently identified it so as to compel the defendant insurance company to defend Chatham. The court declined to direct indemnification, however, because whether Duraluminum

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[30] General notes that under Washington law, the duty to defend arises from the allegations of the complaint. *See Berkeley v. Fireman's Fund Ins. Co.*, 407 F.Supp. 960, 965 (W.D.Wash.1975).

supplied the parts or whether they were defective could not be determined in advance of trial. *Id.* at 962.

The other cases, like *Chatham*, found that upon merger, the predecessor's contractual rights vested in the surviving corporation by operation of the applicable state merger statutes.[31]

In these cases, though, only one underlying suit was involved and the identity of the offending instrumentality, whether a ladder as in *Chatham*, or a filter as in *Brunswick*, was easily traceable to the predecessor company. By contrast, the instant case involves thousands of underlying cases and Grace's exposure arises from the manufacture and sale of asbestos-containing products of one or more of the companies Grace acquired. To make matters worse, the underlying cases do not name the asbestos-containing products that allegedly caused personal injury or property damage. These cases usually name many asbestos manufacturers and do not specify the time of exposure to the particular manufacturers' product. Thus, the parties do not know whether Grace is sued in its own right as the manufacturer or distributor of the asbestos products, as the successor to liabilities arising from products manufactured and distributed by Zonolite prior to its merger into Grace or as the successor to liabilities arising from products manufactured and distributed by a Zonolite licensee prior to its acquisition by Grace.

Grace notes, however, that review of the dates and place of exposure and installation alleged suggests that these cases arise out of products sold by Zonolite and its licensees. As indicated, Grace entered the asbestos business in 1963 when it acquired the Zonolite Company by merger.[32] Grace claims

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[31] New York's merger statute, Business Corporation Law § 906(b)(2) (McKinney 1986), provides that upon merger, "[a]ll the property, real and personal, including subscriptions to shares, causes of action and every other asset of each of the constituent corporations, shall vest in such surviving or consolidated corporation without further act or deed."

[32] Zonolite manufactured and distributed asbestos products, generally in the eastern United States. In other parts of the country, Zonolite

that Zonolite sold asbestos products, either directly or indirectly, throughout the country. Grace also alleges that Royal insured Zonolite from at least 1950 through 1963 and, thus, Royal has a duty to defend Grace in any case involving pre–1963 injury or property damage. Royal did not insure California Zonolite, Ari–Zonolite, Western Mineral or Vermiculite Northwest.

The insurers argue that they have no duty to defend until Grace proves the involvement of their policyholders' products in the underlying cases. Grace, on the other hand, calls that burden unreasonable because one of its principal defenses is that neither its products, nor those of its acquired companies, are involved. Citing *Chatham*, 334 N.Y.S.2d at 961, Grace argues that the insurers have a duty to defend as long as it "can be ascertained" that the acquired company's acts or products may be at issue. The acquired companies' acts or products can be ascertained, according to Grace, because the underlying cases were brought in jurisdictions serviced by these companies. All these cases that allege pre–1963 exposure anywhere in the country must arise out of the activities of Zonolite, Grace adds, and should be covered by Royal. As for the Zonolite licensees, Grace contends, their products, marketed in certain geographic areas, are implicated in those cases alleging exposure in those areas. Thus, in the areas serviced by California Zonolite, Ari–Zonolite, Western Mineral and Vermiculite Northwest, the argument concludes, exposure or installation prior to Grace's acquisition of those companies implicates the policies sold by Aetna and General.

Royal argues that its review of 5,430 underlying complaints shows that not one of that number identify a specific product of the Zonolite Company. The majority of these cases, 4,952, identify Grace as a defendant in its own right and not as a successor to the Zonolite Company. Furthermore, Royal, cit-

had licensing agreements with General's and Aetna's policyholders, Vermiculite–Northwest, Western Mineral, California Zonolite and Ari–Zonolite. Under these agreements, the licensee obtained exclusive authorization to manufacture and distribute Zonolite products containing asbestos in specific geographic areas.

ing *Chatham*, notes that the issue here concerns the identity of the insured rather than the usual issue of whether the policy provides coverage. 334 N.Y.S.2d at 961. Thus, Royal contends that the insured has the burden to show that it is, in fact, an insured under the policy. Not until the insured satisfies this burden, Royal says, does the burden shift to the insurer to show it is not obligated to defend by reason of an exclusion or limiting language in the policy.

This dispute presents a difficult question. Both sides put forth compelling arguments. As Aetna argues, adoption of Grace's position results in an increase in the risk assumed by the predecessor's insurer. Each insurer of a predecessor, for example, would have to handle more claims than it would have absent Grace's acquisitions, Aetna adds, and these claims would include products distributed by entities other than the insured predecessor. The insurers never contracted to assume that increased risk; nor were they compensated for it when they issued the policies. General points to its experience as an example. It insured a small company in the State of Washington, Vermiculate Northwest, employing only fourteen people.[33] Now General, accepting Grace's argument, must defend Grace's operations in Washington and other states.

On the other hand, to accept the insurers' agreement would deny Grace a defense in thousands of underlying cases. If an underlying complaint named Grace and any of its predecessors, none of the insurers that sold coverage to them would provide a defense.

To resolve the dispute, we look to *Chatham* which both sides cite. The insurers rely on *Chatham* to show that the insured must identify the predecessor and the injury-causing product. Grace, on the other hand, cites *Chatham* to show that the duty to defend is construed broadly. *Chatham* found that the insured had sufficiently identified the products of the predecessor in order to invoke the duty to defend. The question

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[33] Vermiculite sold products in five states, Washington, Alaska, Oregon and parts of Montana and Idaho.

here concerns whether Grace has sufficiently identified the products of the predecessor to invoke the duty to defend.

Chatham relied on two cases, which held that even when a complaint does not state sufficient facts to bring a case clearly within or without the coverage, the insurer is obligated to defend if there is potentially a case under the complaint within the coverage of the policy. *Commercial Pipe & Supply Corp. v. Allstate Ins. Co.*, 36 A.D.2d 412, 321 N.Y.S.2d 219, 221 (4th Dep't 1971); *Brooklyn & Queens Allied Oil Burner Service Co. v. Security Mutual Ins. Co.*, 27 Misc.2d 401, 208 N.Y.S.2d 259, 261 (Sup.Ct., Kings Co.1960). That principle has been followed by the Second Circuit. *See, e.g., Ogden Corp. v. Travelers Indemnity Co.*, 924 F.2d 39, 41 (2d Cir.1991); *Avondale*, 887 F.2d at 1204. Indeed, *Avondale* noted that "an insurer seeking to avoid its duty to defend bears a heavy burden." *Id.* at 1204. It must show "as a matter of law that there is no possible basis in law or fact upon which the insurer might be held to indemnify [the insured]." *Id.* at 1205.

Grace, as a successor to Zonolite, has shown that the underlying cases that allege pre–1963 exposure anywhere in the country are arguably or potentially within the coverage of the policies. Grace had no involvement with asbestos before 1963. Grace is sued because of its acquisitions. Its only connection to asbestos could arise out of the activities of Zonolite or Zonolite licensees. The cases brought in the areas serviced by the Zonolite licensees are also potentially within the coverage of the policies. These cases rationally fall within the policy coverage. *Id.* at 1204.

Moreover, given the nature of the underlying complaints, i.e., their lack of specificity, Grace could never, prior to discovery, identify the offending product. To accept the insurers' theory means that Grace would not receive a defense, despite the existence of coverage. That theory places a burden on an insured that it could never satisfy. Thus, we find Grace entitled to a defense.

Royal also argues that in the Zonolite acquisition agreement, Grace took exception to any transfer of Zonolite policy assets. Language in the agreement provided that Grace did not assume those liabilities for which Zonolite was otherwise insured. Thus, the argument goes, Grace cannot be the beneficiary of those Zonolite insurance assets affording coverage for insured liabilities. As Grace points out, though, the acquisition agreement expressly provided for the assignment and transfer of all Zonolite policies to Grace. The clause in the agreement that Royal relies on provides only that Grace would not assume liabilities against which Zonolite was insured or otherwise indemnified. It did not affect the assignment of the policies to Grace. Thus, Royal's argument is rejected.

Royal next argues that the assignment violates the non-assignment clauses in its policies and results in forfeiture of coverage. The assignment clause in the Royal policy reads: "Assignment of interest under this policy shall not bind the Company until its consent is endorsed hereon." Royal recognizes that *Brunswick*, *Imperial*, and *Paxton* did not enforce the identical non-assignment clause, but argues that the assignment has substantially increased its risk and that the clause is not ambiguous. In those cases, the courts found that the assignment did not involve any increase in the risk or hazard assumed by the insurer. *E.g.*, *Brunswick*, 509 F.Supp. at 753. In the present case, Royal submits, since Grace acquired additional asbestos companies, and specific products are rarely identified in asbestos litigation, it must at least defend a greater number of cases generated by other Grace acquisitions. That argument has some merit. But, as Grace counters, if Zonolite remained in business, Zonolite could be sued directly in virtually every one of the underlying cases alleging pre–1963 exposure to a Zonolite product, whether or not manufactured by a licensee. Furthermore, Grace indicates that all of the entities it acquired distributed Zonolite products.

Royal also argues that its non-assignment clause is unambiguous despite the findings in *Imperial Enterprises* and *Paxton* that the identical clause was ambiguous. Those cases found the non-assignment clause ambiguous when taken together with the merger

statute. We have already noted New York's merger statute. Thus, following *Imperial Enterprises*, 535 F.2d at 291, and *Paxton*, 497 F.Supp. at 581, we hold the clause ambiguous in view of the state merger statute.

Accordingly, the insurers' motion for summary judgment on this issue is denied.

Scope of "Accident" Policies Coverage

Aetna and Grace dispute the effect of Aetna's policies. Aetna contends that its pre–1966 policies typically covered only injury "caused by accident," as distinguished from "occurrence" policies. Since Grace maintains that asbestos-related bodily injury and property damage are gradual and continuous, Aetna argues that its policies do not provide coverage to Grace. We need not address this issue at this time because the existence of Aetna's policies has not been established. For the same reason, we do not address Aetna's request concerning the Illinois limitations statute regarding California Zonolite and Ari–Zonolite.

So Ordered.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 91-9322

FILED: JULY 15, 1994

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of July, one thousand nine hundred and ninety-four.

MARYLAND CASUALTY COMPANY,

Plaintiff-Appellee,

—v.—

W.R. GRACE AND COMPANY,

Defendant-Appellant.

CONTINENTAL CASUALTY COMPANY; AETNA CASUALTY & SURETY COMPANY and GENERAL INSURANCE COMPANY OF AMERICA,

Defendants,

ROYAL INDEMNITY COMPANY; AETNA CASUALTY AND SURETY COMPANY,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be heard in banc having been filed herein by Appellant W.R. GRACE AND COMPANY on June 13, 1994.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

SO ORDERED.

FOR THE COURT

GEORGE LANGE III
George Lange III, Clerk

By: KATHY BROWNER
Kathy Browner,
Operations Mgr.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 91-9322

FILED: JANUARY 11, 1994

ORDER

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11th day of January, one thousand nine hundred and ninety-four.

MARYLAND CASUALTY COMPANY,

Plaintiff-Appellee,

—v.—

W.R. GRACE AND COMPANY,

Defendant-Appellant.

CONTINENTAL CASUALTY COMPANY; AETNA CASUALTY & SURETY COMPANY and GENERAL INSURANCE COMPANY OF AMERICA,

Defendants,

ROYAL INDEMNITY COMPANY; AETNA CASUALTY AND SURETY COMPANY,

Defendants-Appellees.

The petitions for rehearing of defendant-appellant W.R. Grace and Company and defendant-appellee Royal Indemnity Company are granted only as to the issue of Insurance Coverage Trigger contained in Part II of our decision, *Maryland Casualty Co.* v. *W.R. Grace and Co.*, 4 F.3d 155 (2d Cir. 1993).

New briefs shall be filed. The briefs should also address the suggestion in both petitions that we certify to the New York Court of Appeals the question of what constitutes asbestos property damage.

The parties should contact Staff Counsel Stanley Bass who will set a briefing schedule.

FOR THE COURT

GEORGE LANGE III

George Lange III, Clerk

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

86 Civ. 9671

May 26, 1992, Decided

May 27, 1992, Filed

STONEWALL INSURANCE COMPANY,

Plaintiff,

—against—

NATIONAL GYPSUM COMPANY, et al.,

Defendants,

NATIONAL GYPSUM COMPANY,

Defendant and Third-Party Plaintiff,

—against—

INTERNATIONAL INSURANCE COMPANY and
H.S. WEAVERS (UNDERWRITING) AGENCIES, LTD.,

Third-Party Defendants.

MEMORANDUM OPINION AND ORDER

JOHN S. MARTIN, JR., *District Judge*.

Plaintiff Stonewall Insurance Company ("Stonewall") is an Alabama corporation with its principal place of business in Alabama. Defendant National Gypsum ("NGC") is a Delaware Corporation. There are 26 insurance companies

which comprise the other defendants and third-party plaintiffs in this action, hereinafter referred to along with Stonewall, collectively as the "Insurers".[1]

Plaintiff Stonewall is seeking declaratory judgment as to the construction and interpretation of certain insurance policies and [the] terms of third party defendants' insurance policies as well as for determination of the rights and obligations of the parties arising from contracts of comprehensive general liability insurance ("CGL").[2] Before the Court now is Defendant NGC's motion for summary judgment pursuant to Rule 56(a) of the F.R.C.P. on these issues. Primarily, NGC seeks a declaration that certain insurance policies at issue in this case give rise: first, to a duty to defend, or to an obligation to reimburse NGC for its costs of defending, the underlying asbestos property damage cases, and second, to indemnify NGC with respect to any settlements or judgments in those cases. NGC also seeks a declaration as to the effect of "short-term" policies, the duty to "drop down," and issues of allocation. We reserve these secondary issues, along with issues concerning the obligations of individual carriers, for a later date. Today, we address only preliminary issues: the duty to

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[1] Affiliated FM Insurance Company, AIU Insurance Company, American Centennial Insurance Company, American Home Assurance Company, American Motorists Insurance Company, Commercial Union Insurance Company, Constitution State Insurance Company, Continental Casualty Company, Employers Insurance of Wausau, First State Insurance Company, Granite State Insurance Company, Highlands Insurance Company, The Home Insurance Company, Houston General Insurance Company, International Insurance Company, Liberty Mutual Insurance Company, Lumbermans Mutual Casualty Company, National Union Fire Insurance Company of Pittsburgh, Old Republic Insurance Company, Puritan Insurance Company, Republic Insurance Company, Security Insurance Company of Hartford, Twin City Fire Insurance Company, United States Fire Insurance Company, Certain Underwriters AT Lloyds, London and H.S. Weavers [Underwriting] Agencies, Ltd.

[2] The Court has jurisdiction to hear this case under *28 U.S.C. § 1332*(a)&(c). There is complete diversity of citizenship; Stonewall is a citizen of Alabama, and the none of the defendants is a citizen of Alabama.

defend, the duty to indemnify, the "occurrence" for purpose of deductibles, the trigger of coverage, and the applicability vel non of the asserted exclusions.

BACKGROUND

During the period 1936 through 1986 the Insurers issued various primary, umbrella and/or excess liability insurance policies to Gypsum, for which all premiums were paid. Until 1976 Gypsum was headquartered in Buffalo, New York. In that year it moved its headquarters to Dallas, Texas. All of the insurance policies at issue were issued and delivered either in New York or Texas. It is the interpretation of the liability under these policies which is at issue here.

National Gypsum manufactures and sells a wide variety of building construction products a number of which, for many years, contained asbestos. By 1981 Gypsum had ceased manufacturing products containing asbestos and was "no longer engaged in any asbestos related operations".[3]

The development of definitive scientific/medical research into the health risks posed by exposure to asbestos are long and involved and need not be set fourth here. Suffice to say that the earliest conclusions were with regard to the harmful effects of workplace exposure to asbestos. Slower to develop was the awareness of the harmful effects of exposure to airborne asbestos resulting from "in-place-asbestos-containing" building products and the technology which allowed the measurement of airborne levels of asbestos fibers related to these products.

Beginning in 1979 the Environmental Protection Agency ("EPA") began a series of publications relating to the minimum levels of exposure to asbestos fibers which would be considered safe. Regulations soon followed with the passage in 1980 of the Asbestos School Hazard Detection and Control Act, *20 U.S.C. § 3601* et seq. and in 1982 with EPA rules

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[3] NGC Memo in Support at 12.

requiring testing for and appropriate warnings of asbestos-containing building materials by educational agencies. 40 C.F.R. § 763.100 et seq.

In 1986 the passage of the Asbestos Hazard Emergency Response Act, *15 U.S.C. § 2641* et seq., directed the EPA to promulgate regulations which would establish criteria for assessing any hazards arising from the presence of asbestos-containing construction materials in schools and to indicate appropriate responses to insure health and environmental protection. The regulations were issued by the EPA in 1987 and are codified at 40 C.F.R. §§ 763.80 et seq.

THE DISPUTE

During the years 1936–1986 NGC maintained general liability coverage with several primary insurers and umbrella and/or excess liability policies with numerous other insurers whose policies generally followed form to the primary policies. Plaintiff Stonewall is one of the excess insurers. According to the pre-1966 policies coverage was provided for:

> . . . all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident.

See e.g. NGC App., Vol.I-B: 50-68[4] (Liberty Mutual Coverage B); 81-82 (SICH/New Amsterdam, Coverage [*6]B, Coverage C). The term accident is not specifically defined in these policies.

After 1966 the policies introduced the concept of "tangible" to that of "property damage". By 1973 the primary policies

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[4] Both NGC and the insurers have submitted extensive appendices, accompanying their briefs. NGC's Appendix is hereinafter referred to as "NGC App. (vol. number): (tab number)"; Insurers' Joint Appendices as: "IJ App. (vol.): (tab).

contained the following language obligating the primary insurers and certain first level insurers to:

> . . . indemnify the insured for all sums which the insured shall become obligated to pay as damages . . . because of . . . property damage . . . caused by or arising out of an occurrence which takes place during the policy period . . .
>
> "Occurrence" means an accident, including continuous or repeated exposure to conditions, which results, during the policy period, in personal injury or property damage . . . neither expected nor intended from the standpoint of the insured . . . .
>
> "Property damage" means physical injury to or destruction of tangible property . . . including the loss thereof.

NGC App., I-A:8 (K00236-37).

Beginning in 1980, largely in response to the EPA publications and new legislation enacted, NGC began to be named as a defendant in a series of lawsuits. Plaintiffs in these suits were seeking damages for, among other things, the cost of repairing, removing, enclosing, encapsulating or otherwise abating the NGC products incorporated in their buildings; the cost of operation and maintenance programs; damages or loss of use of the properties; and damages for diminution of value. As of its motion, Gypsum has settled more than 200 claims, in a variety of procedural postures, ranging from "nuisance value" settlements made on claims, asserted but not yet filed to one which had been tried to conclusion, appealed, reversed in part and remanded for further proceedings and was on the eve of retrial. Such settlements were made as a result of unilateral decisions on Gypsum's part, without approvals from any of the insurance companies who had issued policies.

NGC, subsequent to these settlements, sought indemnification from its primary insurer and from certain of its first level insurers (umbrella and excess) for the amounts incurred

as part of the settlements and for the costs of defending against these claims. NGC contends in this regard that (i) all insurers have a "duty to defend" all claims alleging property damage under the policies and (ii) that these claims are indeed claims for property damage and, therefore, NGC is entitled to indemnification. NGC has moved for summary judgment on these issues and made cross claims against certain of the Insurers as well.

The Insurers oppose the motion primarily on the theory that the underlying claims are not for property damage within the meaning of the policy language. Specifically, the Insurers dispute that (i) the underlying claims are covered claims; and (ii) that even if they were for the purpose of defense, that each claim, individually, must be proved to be covered, especially with respect to the settled claims for the purpose of indemnification. Therefore, they contend, they have not breached any duty to defend or indemnify. The Insurers oppose NGC's motion for summary judgment and have made motions to dismiss and for summary judgment with respect to NGC's cross claims. In addressing these issues, we must necessarily consider what constitutes property damage within the meaning of the policies, what constitutes an occurrence for the purpose of deductibles, what is the appropriate trigger of coverage, and the applicability of various exclusions.

GOVERNING LAW

A. What Law Governs. The first determination which this Court must make is the one of which law governs the issues in this case. A federal court sitting in diversity must apply the choice of law rules of the forum state. *Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 496-97, 61 S.Ct. 1020 (1941).* New York applies an "interest analysis" or "most significant interest" approach to choice of law in insurance contract interpretation. See *Olin Corp. v. Insurance Co. of North America, 743 F. Supp. 1044, 1048 (S.D.N.Y. 1990),* aff'd, *929 F.2d 62 (2d Cir. 1991); McGinniss v. Employers Reinsurance*

Corp., 648 F. Supp. 1263, 1267 (S.D.N.Y. 1986). Among the factors considered in determining which state has the "most significant interest" are: where the policies were issued and delivered; the insured's principle place of business; where the premiums were paid; the location of the broker or agent placing the polices. *Olin, 743 F. Supp. at 1048.* Applying this analysis this court finds that New York will govern with respect to the insurance contracts which were negotiated, issued and delivered to NGC while it was headquartered in New York; and Texas law will govern those contracts which were issued and delivered to NGC after the move to Texas.

B. Summary Judgment Standards. NGC has moved for summary judgment on issues of insurance contract interpretation raised by the Insurers in their complaint. The standard for summary judgment is set forth in Fed. R. Civ. P. 56(c) which provides that summary judgment "shall be granted forthwith if the pleadings, depositions, answer to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Insurance contracts in diversity actions must be interpreted under the applicable state law. *See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938).* In this case the parties concede that either New York law or Texas law will govern, depending upon the ultimate construction of the policy language at issue and the periods during which the policies were in effect. The Court will analyze the issues raised under the laws of both states.

With respect to New York law, the Court adopts the analysis set forth by Judge Weinstein in *Uniroyal Inc. v. Home Ins. Co., 707 F. Supp. 1368, 1372-78 (E.D.N.Y. 1988).* In Uniroyal Judge Weinstein resolved the tension between the Federal Rules of Civil Procedure and New York law[5] with respect to ambiguous insurance policies as follows:

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[5] "Two aspects of 'ambiguity' appear to be in conflict: ambiguity in an insurance contract that may render summary judgment improper as a matter of federal civil procedure; and ambiguity in an insurance con-

> A motion for summary judgment on an ambiguous insurance policy in a diversity case appears to invoke these inconsistent rules simultaneously . . . . the proper resolution under federal procedure and New York law is that summary judgment is proper on an ambiguous policy when, after having allowed full discovery and found no valuable extrinsic evidence of the parties' intent, the court applies as a last resort the state law presumption construing the policy against the insurer.

Uniroyal, 707 F. Supp. at 1373.

Texas law is in accord with New York law with respect to the ultimate presumption against the insurer. "Texas follows the well-settled rule that insurance polices will be interpreted liberally, in favor of the insured and ambiguities strictly against the insurer, especially when dealing with exceptions and words of limitation . . . ." *Dow Chemical Co. v. Royal Indem. Co., 635 F.2d 379, 386 (5th Cir. 1981).* Accord *Holcomb v. Prudential Ins. Co., 673 F.2d 102 (5th Cir. 1982); Ranger Ins. Co. v. Bowie, 574 S.W.2d 540 (Tex. 1978).*

Thus a federal court must grant "summary judgment only after full discovery discloses no extrinsic evidence raising a question of credibility or suggesting a choice among reasonable inferences. At that point . . . [it] is constrained under New York law to construe the ambiguity against the insurer as a matter of substantive law." *Uniroyal, 707 F.Supp. at 1374.*

C. Construction of Insurance Contracts. The construction of insurance contracts in New York and in Texas follows similar but not identical reasoning. Under Texas law an insurance contract is ambiguous when it is found to be reasonably susceptible to more than one construction, after applying estab-

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tract that must be construed by the court as a matter of substantive state contract law. The former . . . stresses that ambiguity inherently necessitates a full presentation of extrinsic evidence for the factfinder's evaluation. The latter . . . rests on the assumption that as a matter of substantive state insurance contract law ambiguities in an insurance policy are to be construed against the insurer." *Uniroyal, 707 F. Supp. at 1373.*

lished rules of construction. *Richland Plantation Co. v. Justiss-Mears Oil, 671 F.2d 154, 156 (5th Cir. 1982).* The determination as to ambiguity is for the Court, as a matter of law. *Ideal Mutual Ins. Co. v. Last Days Evangelical Ass'n, 783 F.2d 1234, 1238 (5th Cir. 1986).* Where the terms of an insurance contract have been determined to be unambiguous, they shall be given their "plain, ordinary and generally accepted meaning unless . . . . used in a technical or different sense." *Ramsay v. Maryland Am. Gen. Ins. Co., 533 S.W. 2d 344, 346 (Tex. 1976).* In resolving ambiguity, extrinsic evidence with respect to the parties intent is a matter of fact. *Richland, 671 F.2d at 156.* If the contract terms are unambiguous, the contract alone will be deemed to express the intention of the parties, "for it is objective, not subjective, intent that controls." *Watkins v. Petro-Search, Inc., 689 F.2d 537, 538 (5th Cir. 1982).* If contract terms are ambiguous, certain special rules of construction shall apply: (i) the court must resolve ambiguities in a manner which favors the insured and permits recovery, so long as the construction is reasonable; and (ii) with respect to exclusions or limitations, ambiguities shall be construed against the insurer. *Brooks, Tarlton, Gilbert, Douglas & Kressler v. U.S. Fire Ins. Co., 832 F.2d 1358, 1365 (5th Cir. 1987).*

Under New York law an insurance contract must be construed to effect the intent of the parties as expressed by their words and purposes. *American Home Products Corp. v. Liberty Mutual Ins. Co., 565 F. Supp. 1485, 1492 (S.D.N.Y. 1983)*, aff'd, *748 F.2d 760 (2d Cir. 1984)* ("AHP"). The construction of ambiguous provisions must not be inconsistent with the plain meaning of the language or the parties obvious intentions. *AHP, 565 F. Supp. at 1492.* The policy must be viewed from the vantage point of the "reasonable expectations and purposes of the ordinary businessman." *Avondale Indus., Inc. v. Travelers Indem. Co., 697 F. Supp. 1314, 1319 (S.D.N.Y. 1988)*, aff'd, *887 F.2d 1200 (2d Cir. 1989)*, cert. denied, *496 U.S. 906, 110 S.Ct. 2588 (1990).* Furthermore, if a contract of its terms appear ambiguous, the burden is on the

insurer to establish that the construction it seeks is the only one fairly to be placed upon it. *Vargas v. Insurance Co. of North America, 651 F.2d 838, 840 (2d Cir. 1981)*. In resolving an ambiguity, if the insurer's construction is as reasonable as not, then the court must look to extrinsic evidence for aid in ascertaining the parties intent. *Uniroyal, 707 F. Supp. at 1374-75*. If such extrinsic evidence raises an issue of credibility, then it is an issue of fact for the factfinder. *Uniroyal, 707 F. Supp. at 1374*. If there is no material extrinsic evidence, *Carvel Corp. v. Rait, 503 N.Y.S.2d 406, 409* (2d Dep't 1986), or if such evidence fails to raise credibility or present a choice among reasonable inferences, it is a case for construction by the court as a matter of law. *Alfine, Inc. v. Pacific Ins. Co., 735 F. Supp. 115, 119 (S.D.N.Y. 1990)*. In this event "the court must follow the rule of contra proferentum to construe any ambiguities against the insurer drafter." *Uniroyal 707 F. Supp. at 1376*.

I. The Duty to Defend

Several of the primary-level CGL policies[6] issued to NGC provide, in essentially the same language, that the insurer "shall defend any suit against the insured alleging such injury . . . or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent. . . ." See NGC App. I-B:50-68; 81-82.[7]

These insurers, as both primary and first level umbrella carriers, maintain that there is no duty to defend claims which are not covered claims. They contend that the underlying claims asserted against NGC are not covered claims for property damage, and thus no duty to defend is implicated.

The duty to defend is "broader and heavier than the duty to indemnify." *Savoy Medical Supply Co. v. F&H Mfg. Corp.*,

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[6] E.g., policies issued by Liberty Mutual from 1936 to 1951, by New Amsterdam from 1953 to 1962 and by AMICO from 1973 to 1976.

[7] We do not decide today which carriers have a duty to defend, but merely determine the extent of that duty of those carriers which eventually may be required to defend or reimburse NGC.

776 F. Supp. 703 (E.D.N.Y. 1991) (citing *Avondale Indus., Inc. v. Travelers Indem. Co., 887 F.2d 1200, 1204 (2d Cir. 1989)*, cert. denied, *496 U.S. 906, 110 S.Ct. 2588 (1990)*); *National Grange Mut. Ins. Co. v. Continental Casualty Ins. Co., 650 F. Supp. 1404, 1407 (S.D.N.Y. 1986)*; *Servidone Constr. Corp. v. Security Ins. Co., 488 N.Y.S.2d 139 (1985)*. Both New York law and Texas law are in agreement with respect to this issue. In *Baldwin v. Aetna Casualty and Surety Co., 750 S.W.2d 919, 921 (Tex. Ct. App. 1988)* the court stated:

> In deciding whether it has a duty to defend under a policy, the insurance company compares the allegations of the complaint with the policy provisions. If the complaint alleges a claim that is covered by the policy, the company must defend, regardless of the truth or falsity of the claim.

Baldwin, 750 S.W.2d at 921 (citations omitted). See also *Winn v. Continental Casualty Co., 494 S.W.2d 601, 603-05 (Tex. Civ. App. 1973)*; *Argonaut Southwest Ins. Co. v. Maupin, 500 S.W.2d 633, 635 (Tex. 1973)*.

New York has held to the same standard:

> Where an insurance policy includes the insurer's promise to defend the insured against specified claims as well as to indemnify for actual liability, the insurer's duty to furnish a defense is broader than its obligation to indemnify. The duty to defend arises whenever the allegations . . . fall within the scope of the risks undertaken . . . regardless of how false or groundless those allegations might be. The duty is not contingent on the insurer's ultimate duty to indemnify should the insured be found liable, nor is it material that the complaint against the insured asserts additional claims which fall outside the policy's coverage or within its exclusory provisions. Rather, the duty of the insurer rests solely on whether the complaint alleges any facts or grounds which bring the action within the protection purchased.

Seaboard Surety Co. v. Gillette Co., 486 NY.S.2d 873, 875-76 (1984) (citations omitted). See also *Ogden Corp. v. Travelers Indem. Co., 924 F.2d 39, 41 (2d Cir. 1991)*; *Avondale Industries, Inc. v. Travelers Indem. Co., 887 F.2d 1200 (2d Cir. 1989)*, cert. denied, *496 U.S. 906, 110 S.Ct. 2588 (1990)*; *Boyce Thompson Institute v. Insurance Co. of N. America, 751 F. Supp. 1137 (S.D.N.Y. 1990)*; *Olin Corp. v. Insurance Co. of North America, 603 F. Supp. 445, 448 (S.D.N.Y. 1985)*; *Goldberg v. Lumber Mut. Casualty Ins. Co., 297 N.Y. 148, 154, 77 N.E.2d 131, 133 (1948)*.

The consequences of the foregoing are as follows:

> Thus the insurer is required to provide a defense to any action, however groundless, in which there exists any possibility that the insured might be held liable for damages where facts are alleged within the coverage of the policy.

National Grange Mutual Ins. Co. v. Continental Casualty Ins. Co., 650 F. Supp. 1404, 1407-08 (S.D.N.Y. 1986).

Under New York law, for defense purposes, the burden of establishing that the underlying claims do not allege property damage is on the insurer. As such, to avoid the duty to defend, an insurer must "establish, 'as a matter of law, that there is no possible factual or legal basis on which the insurer might eventually be obligated to indemnify.' " Maryland Casualty v. W.R. Grace & Co., No. 83-7451, slip op. (S.D.N.Y. March 1, 1991) (quoting *Abex Corp v. Maryland Casualty Co., 790 F.2d 119, 129 (D.D.C. 1986)* (applying New York law)). "Before an insurance company is permitted to avoid policy coverage, it must . . . establish that the exclusions and exemptions apply in the particular case, and that they are subject to no other reasonable interpretation." *Seaboard, 64 N.Y.2d at 311, 486 N.Y.S.2d at 876*. See also *Avondale, 887 F.2d at 1205*.[8]

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[8] While there is case law suggesting that, under Texas law, the burden is on the insured, see, e.g., *Winn v. Continental Casualty Co., 494 S.W.2d 601)*, this burden is light considering the liberal construction given to the underlying complaints.

Additionally, courts in both states have liberally interpreted the degree of specificity with which the allegations must be set forth in order to invoke the duty to defend. See *Heyden Newport Chemical Corp. v. Southern General Ins. Co., 387 S.W.2d 22 (Tex. 1965)* (insurer has obligation to defend even if complaint does not clearly state facts sufficient to bring the case within coverage; potential for coverage will suffice). See also *Monarch Ins. Co. v. Hetherly, 560 N.Y.S.2d 745, 746 (1990)* ("The duty to defend is not affected simply because alternative causes of action are pled in the complaint, some of which are outside the coverage"). See also *Commercial Union Ins. Co. v. Albert Pipe & Supply Co., 484 F. Supp. 1153, 1157 (S.D.N.Y. 1980)* (insurer obligated to defend where underlying complaint raised claim "potentially covered by the Policy"); *Western World Ins. Co. v. Jean & Benny's Restaurant, 419 N.Y.S.2d 163 (2d Dep't 1979)*, appeal dismissed, *421 N.Y.S.2d 202 (1979)* (insurer not absolved from duty to defend merely because some claims outside policy's coverage are joined with claims falling within policy's coverage).

Thus, an insurer is obligated to defend if: (i) the alleged damage is potentially a covered loss under the policy and if, (ii) the alleged covered damage occurred during the policy period. See *American Home Products Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1499 (S.D.N.Y. 1983)*; *Olin Corp. v. Insurance Co. of N. America, 603 F. Supp. 445 (S.D.N.Y. 1985)*. The insurer denying the duty to defend has "the burden to establish as a matter of law on a summary judgment motion that the injury complained of falls outside the coverage of the policy or that claims against the insured are unambiguously exempted from coverage." *Munzer v. St. Paul Fire & Marine Ins., 538 N.Y.S.2d 633, 636* (3rd Dep't 1989); see also *Winn v. Continental Casualty Co., 494 S.W.2d 601, 604-05 (Tex. Civ. App. 1973)*. As such, NGC will be entitled to summary judgment on the duty to defend unless the Insurers establish as a matter of law that property damage did not occur during the applicable policy periods or that the policy has no effect, e.g., because of a policy exclusion.

Under both New York and Texas law, therefore, the Insurers' duty to defend is triggered by claims against NGC which allege property damage caused by incorporation of asbestos containing material into buildings if such claims could conceivably be considered to be for "property damage" within the meaning of the policy language. As such, the sole issue before the Court in determining the duty to defend is whether, on the allegations of the underlying complaints, there is "any possibility" that NGC might be held accountable for claims within the coverage of the policy.

Turning to the pleadings in the underlying complaints, the Court finds that the great majority of these pleadings, interpreted liberally, allege property damage in a manner sufficient to invoke the insurers' duty to defend.[9] Moreover, the Court finds that the minority of the complaints which fail to explicitly allege property damage do so implicitly by alleging "economic loss" and seeking removal costs. Against this background, the Court concludes that the allegations in the underlying complaints permit evidence of property damage within the meaning of the policies.[10]

Wilkin Insulation, 193 Ill. App. 3d at ?. See also Carey Canada, Inc. v. Aetna Casualty and Surety Co., No. 84-3113, slip op. (D.D.C. March 31, 1988) (treating 90 underlying claims as a group); Pittsburgh Corning Corp. v. Travelers Indem. Co., No. 84-3985, slip op. (E.D. Pa. Jan 20, 1988) (treating 42 underlying claims the same); *Burroughs Well-*

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[9] See Reply Memorandum of Defendant NGC, Exhibit A (chart detailing "property damage" allegations in the underlying complaints)

[10] In reaching this conclusion, the Court endorses the reasoning of *Wilkin Insulation Co. v. United States Fidelity & Guaranty Co., 193 Ill. App. 3d 1087, 550 N.E.2d 1032 (1989)*, aff'd on other grounds, *114 Ill. 2d 64, 578 N.E.2d 926 (1991)*, in which the Illinois Court of Appeals observed:

> Although some of the complaints may have articulated the resulting property damage more than other complaints, we are in agreement with defendants that since the underlying claims arise from the same set of circumstances, the allegations in any single complaint can be inferred in the other complaints.

come Co. v. Commercial Union Ins. Co., 632 F. Supp. 1213, 1218 (S.D.N.Y. 1986) (finding scrutiny of underlying claims in mass tort case unnecessary where facts underlying the complaints are similar).

Our decision today should not be interpreted as precluding defendants from demonstrating that particular underlying actions do not involve property damage.

II. The Duty to Indemnify

Having determined that the duty to defend has been invoked, the Court turns to the issue of the insurers' duty to indemnify. On this issue, the leading case—and for those policies governed by New York law, the controlling case—is Servidone. In Servidone, the trial court, after reviewing the allegations in the underlying liability complaint, had determined that the insurer had breached its duty to defend. Because the insured had settled the underlying claims, the trial court awarded the insured the defense costs and the amount of the settlement. On appeal, the insurer did not contest the determination that it owed a duty to defend, and conceded the "reasonableness of the settlement." Rather, the issue before the New York Court of Appeals was whether the insurer was obligated to indemnify the insured for settlement costs absent an independent showing that the claim fell within the policy coverage. After careful analysis, the Court of Appeals held that the duty to indemnify cannot be based on the mere possiblity of coverage, but rather must be based on an independent factual finding that the insured's liability is within the coverage provided by the policy. As such, the Court of Appeals stated

> An insurer's breach of [a] duty to defend does not create coverage and that, even in cases of negotiated settlements, there can be no duty to indemnify unless there is first a covered loss.

Servidone, 488 N.Y.S.2d at 142. The Court of Appeals based its holding on the difference between the duty to defend and the duty to indemnify:

> The duty to indemnify is, however, distinctly different. The duty to defend is measured against the allegations of [the] pleadings but the duty to pay is determined by the actual basis for the insured's liability to a third person. *Servidone, 488 N.Y.S.2d at 142. See also Ingber v. Home Ins. Co., 527 N.Y.S.2d 630, 632* (3rd Dep't 1988) (applying Servidone and holding that the insurer's "duty to indemnify turns not on the pleadings but on the actual facts"); *Rochester Woodcraft Shop v. General Accident Fire & Life Assurance Corp., 316 N.Y.S.2d 281, 283* (4th Dep't 1970) (holding that the duty to defend should "be tested against the allegations of [the underlying] complaint," but the duty to indemnify against "the applicability of the exclusion clause in the light of the actual facts") (emphasis added).

This is not to say that Servidone requires the insured to prove the truth of the underlying claims. *Uniroyal, 707 F. Supp. at 1379* (Servidone "never held than an otherwise covered claim, once settled, must be proven anew by the insured"). Rather, Servidone merely requires that the insured prove that the underlying claim was a "covered loss."

The law of Texas is the same on this issue. See, e.g., *Employers Casualty Co. v. Block, 744 S.W.2d 940, 944 (Tex. 1988)* (holding that "an insured cannot recover under an insurance policy unless facts are pleaded and proved showing that damages are covered by his policy"). Accord *Hargis v. Maryland American General Ins. Co., 567 S.W.2d 923, 927 (Tex. App. 1978)*.

Here, NGC seeks indemnification for numerous settled claims. As the Second Circuit has noted:

> When an insurer declines coverage, as here, an insured may settle rather than proceed to trial to determine its

> legal liability. In order to recover the amount of settlement from the insurer, the insured need not establish actual liability to the party with whom it has settled "so long as . . . a potential liability on the facts known to the insured is shown to exist, culminating in a settlement in a an amount reasonable in view of the size of possible recovery and degree of probability of claimant's success against the insured."

Luria Bros. & Co. v. Alliance Assurance, 780 F.2d 1082, 1091-92 (2d Cir. 1986) (quoting *Damanti v. A/S Inger, 314 F.2d 395, 397* (2d Cir.) cert. denied, *375 U.S. 834, 84 S.Ct. 46 (1963)*. See also *Uniroyal, 707 F. Supp. at 1378*.

The next issue for decision is whether the incorporation of asbestos containing material into a physical structure constitutes property damage within the meaning of the insurance policies issues to NGC. If the Court answers this question in the affirmative, then NGC will have met its burden of establishing "a potential liability on the facts known" at the time of the settlements at issue.

As previously noted, the language at issue in the pre-1966 insurance policies states that the primary insurers and certain first level insurers will:

> . . . pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including loss thereof, caused by an accident. . . .

See, e.g., NGC App. I-B:50-68 (Liberty Mutual, Coverage B); 81-82 (SICH/New Amsterdam, Coverage B, Coverage C).

The 1966 and subsequent comprehensive general liability policies ("CGL") introduce the modifier "tangible" to the concept of property damage and substitute the term "occurrence" for the previously undefined "accident".

In general, the 1973 CGL policies read:

> . . . indemnify the insured all sums which the insured shall become obligated to pay as damages because of

> . . . property damage . . . caused by or arising out of an occurrence which takes place during the policy period.

See, e.g., NGC App. I-A:8 at K00236, K00237.

> 'Property damage' means i) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or ii) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

See, e.g., NGC App.I-A 8 at K00003, K00007 (AMICO).

"Occurrence" is in turn defined as:

> . . . an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

Id.

See NGC App. I-A, Tab 5 (American Centennial Coverage B, at 422037): Policy there defines "occurrence" as:

> . . . either an accident or happening or event or a continuous or repeated exposure to conditions which unexpectedly or unintentionally causes injury to persons or tangible property during the policy period. All damages arising out of such exposure to substantially the same general conditions shall be considered as arising out of one occurrence.

NGC argues that the underlying claims, in one form or another, are for property damage which commenced with the installation of ACM. NGC points to the developing line of asbestos cases to indicate that underlying claims of this type have been acknowledged as property damage resulting from

contamination of buildings due to structural incorporation of asbestos products.

The Insurers, on the other hand, press an analysis of the underlying claims which would hold that they are not for property damage but for recovery of costs incurred arising from (i) "government-mandated"[11] abatement requirements and the resulting need for compliance; (ii) taking preventive measures to avert future health risks; (iii) remedial expenditures required due to defective products. They further assert that liability insurance has "never been written to respond to the costs of repairing or replacing products . . . because they fail to meet government-imposed health or safety standards. . . . Ongoing government regulation . . . is a fact of business life." As such, the Insurers contend, the claims do not allege the requisite "actual" physical damage to property which would trigger the duty to indemnify under the policies.

The question of whether the underlying claims against NGC are for actual property damage within the meaning of the insurance policy language must be resolved in a manner consistent with the relevant cases in New York and Texas, although in an evolving area of the law such as this, developments in other jurisdictions should be considered in determining how the issue would ultimately be decided by the highest courts in New York and Texas.

Reviewing the underlying complaints and the applicable case law, the Court is persuaded that the underlying claims are for property damage and hence are covered claims under the policies. See, e.g., *Dayton Independent School Dist. v. Nat'l Gypsum Co., 682 F. Supp. 1403, 1408 (E.D. Tex 1988)* ("property damage alleged by Plaintiffs constitutes 'direct damage to tangible property,' and comes within the definition of property damage set forth in the policies"), vacated on

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[11] NGC counters that neither removal nor abatement is in fact mandated by government regulations. NGC references 40 C.F.R. § 61.145(d) as requiring only that certain precautions and procedures be taken if ACM is removed during renovation. NGC Reply Memo at 36.

jurisdictional grounds sub nom., *W.R. Grace & Co. v. Continental Cas. Co., 896 F.2d 865 (5th Cir. 1990)*; Maryland Casualty Co. v. W.R. Grace & Co., No 83-7451, slip op. (S.D.N.Y. March 1, 1991). See also *Carey Canada, Inc. v. California Union Ins. Co., 748 F. Supp. 8, 10 (D.D.C. 1990)* (installation of asbestos constitutes property damage for policy coverage); Lac d'*Amiante du Quebec, Ltee. v. American Home Ins. Assurance Co., 613 F. Supp. 1549, 1561 (D.N.J. 1985)* ("the asbestos . . . contaminated. . . . Such contamination constitutes physical injury to Plaintiff's premises"); *Greenville v. W.R. Grace & Co., 640 F. Supp. 559, 564 (D.S.C. 1986)* (finding plaintiff "unquestionably suffered property damage in its building"), aff'd on other grounds, *827 F.2d 975 (4th Cir. 1987)*; University System of New Hampshire v. National Gypsum Co., No. 84-0716, slip op. (D.N.H. July 2, 1985) (describing asbestos case as "a hybrid of economic loss and property damage" creating a "cognizable injury to . . . plaintiff's property"). Cf. *Avondale Indus., Inc. v. Travelers Indem. Corp., 887 F.2d 1200 (2d Cir. 1989)*; *Aetna Casualty & Surety Co. v. General Tire Co., 704 F.2d 80, 83 (2d Cir. 1983)*; *New York v. Keene Corp., 505 N.Y.S.2d 782 (1986)*, aff'd, *513 N.Y.S.2d 1004* (1st Dep't 1987); *United States Fidelity & Guaranty Co. v. Wilkin Insulation, 144 Ill.2d 64, 578 N.E.2d 926 (Ill. 1991)* ("Wilkin III"); EPA Study of Asbestos-Containing Material in Buildings, Feb. 1988; EPA Guidance for Controlling Asbestos-Containing Materials in Buildings, June 1985.

The Insurers have misconstrued the issue when they asset that the underlying claims are not based on actual property damage but rather are based solely economic losses driven by the need for regulatory compliance or preventative safety measures. Here, the claims for property damage are based on the allegation that the installation of asbestos containing material in a building as well as subsequent disturbances of that material result in the release of asbestos fibers into the atmosphere within the building and that the presence of these fibers presented a health hazard to anyone using the building.

Thus, the damage is from the release of the fibers into the building, not from the regulatory requirement that the asbestos be removed, even though the cost of removal may be an appropriate item of damages.

The distinction between the property damage claim alleged here and the economic loss to meet a regulatory compliance standard to which the insurers refer is found in comparing the present case to the situation that would exist if Congress mandated new standards for flame-retardant material and required the removal and replacement of all such material that did not meet the new standard. In the latter case, the insurer's argument would prevail since removal would be required solely to meet a regulatory change. Here, however, the regulatory change is designed to insure that an existing condition that causes damage is corrected.

III. What is the Occurrence

The next issue the Court must address is what constitutes the "occurrence" which results in property damage. The determination of the number of occurrences will establish the number of deductibles each insurer may claim.

The contention that calculation of the number of occurrences turns on the number of claims can be quickly disposed of. It well settled that, in determining the number of occurrences for deductibles, the focus should be on "the underlying circumstances which resulted in the claim for damages" rather than on the number of persons injured or items damaged. *Champion Int'l Corp. v. Continental Casualty Co., 546 F.2d 502, 506 (2d Cir. 1976)*, cert. denied, *434 U.S. 819, 98 S.Ct. 59 (1977)*. Furthermore, turning to the language in the insurance policies, the parties' "selection of a 'per occurrence' basis and the corresponding rejection of a 'per claim' basis' indicates that the liability policy was not intended to gauge coverage on the basis of individual accidents giving rise to claims, but rather on the underlying circumstances which resulted in the claims for damages . . ." *Champion,*

546 F.2d at 506.[12] See also, *Newmont Mines, Ltd. v. Hanover Ins. Co., 784 F.2d 127, 135 (2d Cir. 1986)* ("In construing the term 'occurrence' as used in liability insurance policies, courts generally 'have concluded . . . the number of occurrences for purposes of applying coverage limitations is determined by reference to the cause or causes of the damage and not the number of injuries or claims' ") (quoting *Michigan Chemical Corp. v. American Home Assurance Co., 728 F.2d 374, 379 (6th Cir. 1984)); Owens-Illinois, Inc. v. Aetna Casualty & Surety Co., 597 F. Supp. 1515, 1525 (D.D.C. 1984)* (reviewing similar policy language and concluding that "the number of injuries or claims, even if temporally removed from their causes, are irrelevant when determining the number of occurrences"); *Transport Ins. Co. v. Lew Way Motor Freight, Inc., 487 F. Supp. 1325, 1330 (N.D. Tex 1980)* (same, applying Oklahoma law).

Thus, rather than looking to the claims, a court should look to the underlying event. The test in New York for determining what constitutes this underlying event or occurrence was set forth in *Arthur A. Johnson Corp. v. Indem. Ins. Co., 196 N.Y.S.2d 678 (1959)*. The New York Court of Appeals, reviewing previous case law, distinguished three classes of decisions: (i) those that found a separate accident for each negligent act or omission; (ii) those that found a separate accident for each injury; and (iii) those that found a separate accident for each "event of an unfortunate character." *Johnson, 196 N.Y.S.2d at 683*. After weighing the merits of each test, the Court of Appeals adopted the "unfortunate event" test as the appropriate test for determining what constitutes an accident. This test, the court concluded, "corresponds most

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[12] The very language of the policies is evidence that both NGC and the Insurers contemplated each covered occurrence to be a significant event, generating a number of claims. See Uniroyal at 1386; *Newmont Mines, 784 F.2d at 136; Transport Ins. v. Lee Way, 487 F. Supp. at 1329*. The Insurers construction that each claim constitutes an occurrence would render the choice of "occurrence" based policies meaningless and the application of multiple deductibles would, as NGC argues, create virtually no coverage. This is most clearly not the expectation of the parties.

closely with what the average person anticipates when he buys insurance and reads the 'accident' limitation in the policy." Johnson, 196 N.Y.S.3d at 684. See also *Hartfort Accident & Indemnity Co. v. Wesolowski, 350 N.Y.S.2d 895 (1973)* (applying the unfortunate event test to "occurrence" as well as "accident").

The test in Texas is less clear. However, review of Texas case law suggests that a Texas court would follow a similar "cause" analysis. See, e.g., Carpenter Plastering Co. v. Puritan Ins. Co., No. 87-2435, slip op. (N.D. Tex Aug. 23, 1988) (adopting cause test to find that leakage of defective wall panels one occurrence); *Transport Ins. Co. v. Lee Way Motor Freight, Inc., 487 F. Supp. 1325 (N.D. Tex 1980)* (applying Oklahoma law and following cause analysis to determine that insured's pattern and practice of race discrimination constitutes one occurrence). But see *Maurice Pincoffs Co. v. St. Paul Fire & Marine Ins. Co., 447 F.2d 204 (5th Cir. 1971)* (finding each of eight sales of contaminated bird seed a separate occurrence).

Even with these tests at hand, determining what constitutes the occurrence in the facts before us is no simple task. NGC contends that the unfortunate event constituting the occurrence for coverage purposes is their decision to enter asbestos containing material into the stream of commerce. As such, they argue that despite the numerous claims filed against them or the large number of buildings involved, there was and remains but one occurrence, and therefore each insurer is entitled to only one deductible. The Insurers, on the other hand, maintain that each sale or delivery constitutes a separate occurrence. Under this alternative approach, the typical insurer would have the benefit of several deductibles.

The parties offer little by way of extrinsic evidence with regard to the meaning they attach to the concept of "occurrence." Therefore, the interpretation of the policy language is left to this Court under both Texas and New York law, as noted earlier. Under the well-settled doctrines of both states, a court must resolve ambiguity in a manner which favors the

insured and permits recovery, so long as the construction is reasonable. *Ideal Mutual, 783 F.2d at 1238.* See also *Uniroyal, 707 F. Supp. at 1377; Miller v. Continental Ins. Co., 389 N.Y.S.2d 565, 567 (1976).*

Applying this presumption, while also keeping in mind "the business purposes sought to be achieved by the parties and the plain meaning of the words chosen by them to effect those purposes,' " *Champion, 546 F.2d at 505*, the Court concludes that the occurrence was the decision of NGC to manufacture and sell asbestos containing products. The opposite conclusion, that property damage to each building should constitute one occurrence, is not only insupportable under the facts but would also deprive NGC of the coverage it bargained for, allowing the Insurers to escape the responsibilities which they obligated themselves to shoulder. Accordingly, the occurrence for the purpose of deductibles was NGC's decision to manufacture and sell asbestos containing materials. As such, each insurer obligated to indemnify will be able to claim one deductible.

Our conclusion is in accord with the conclusion reached in *Owens-Illinois, Inc. v. Aetna Casualty & Surety Co., 597 F. Supp. 1515 (D.D.C. 1984).* In Owens-Illinois, a manufacturer of asbestos containing products sought a declaratory judgment on the issue of its insurer's obligation to indemnify. Upon reaching the "occurrence" issue, the court rejected the insurer's argument that each personal injury claim constituted a separate occurrence, and concluded that the manufacture and sale was "the single occurrence." As such, the insured's coverage was held to be subject to a single deductible. *Owens-Illinois, 597 F. Supp. at 1528.*

This determination is also consistent with the conclusions reached in various non-asbestos cases. In Uniroyal, a case which involved determination of insurers' liability to the manufacturer of Agent Orange, Judge Weinstein concluded that the delivery of Agent Orange to the Government, rather than to the manufacture, actual spraying, or individual exposures, constituted a "single continuous occurrence" for cov-

erage purposes. Similarly, in Carpenter Plastering Co. v. Puritan Ins. Co., No. 87-2435, slip op. (N.D. Tex. Aug 23, 1988), defective wall panels were sold and installed. Rather than finding that each sale or installation or resulting injury constituted a separate occurrence, the court held that all sales constituted a single occurrence giving rise to multiple injuries. A nearly identical fact pattern was present in Household Manufacturing, Inc. v. Liberty Mutual Ins. Co., No. 85-8519, slip op. (N.D. Ill. Feb. 10, 1987), which involved multiple separate deliveries of defective plumbing units. Because all of the plumbing units were defective, the court concluded that the "numerous shipments" on a "mass basis" were a unitary " 'continuous and repeated exposure' to the same conditions" and thus one occurrence. Likewise, in American Universal Ins. Co. v. McCloskey Varnish Co, No. 83-5161, slip op. (E.D. Pa. March 19, 1985), the court rejected the argument that individual shipments or resulting injuries were separate occurrences and found the practice of supplying defective resins to be a single occurrence. *Cargill, Inc. v. Liberty Mutual Ins. Co., 488 F. Supp. 49 (D. Minn. 1979)*, aff'd, *621 F.2d 275 (8th Cir. 1980)* involved the sales of a defective nutrient medium for cultivating erythromycin. The court rejected the insurers contention that each sale was a separate occurrence and held that "there was but one occurrence, even though numerous production 'batches' of erythromycin were affected." *Cargill, 488 F. Supp. at 53.* See also *Champion Int'l Corp. v. Continental Casualty Co., 546 F.2d 502 (2d Cir. 1976)*, cert. denied, *434 U.S. 819, 98 S.Ct. 59 (1977)* (1400 installations of defective panelling one continuous and repeated occurrence); *Union Carbide Corp. v. Travelers Indem. Co., 399 F. Supp. 12 (W.D. Pa. 1975)* (sales of defective resin-former oil held to be one occurrence, encompassing all sales of the product); *Southern Int'l Corp. v. Poly-Urethane Indus., Inc., 353 So.2d 646, 648 (Fla. Dist Ct. App. 1977)* (applications of sealant to roofs which resulted in damage to several condominiums held to be one occurrence).

IV. Trigger of Coverage

The various policies issued to NGC cover each event which results in property damage during the policy period. In other words, each policy extends coverage to injuries that occur during the effective dates of the policy. For example, injuries that occur prior or subsequent to the effective dates of Policy A will not be covered by Policy A. The injuries may, however, be covered by Policy B if Policy B was in effect during the time of the injury. Thus, as a prerequisite to determining which policies were invoked, or "triggered," the Court must determine the date of the injuries resulting from the occurrence.

Of the several trigger theories that exist, New York has adopted an injury in fact theory.[13] See, e.g., *American Home Products, 748 F.2d at 764; Abex Corp. v. Maryland Casualty Co., 790 F.2d 119, 121, 124-26 (D.C. Cir. 1986)* (citing AHP as properly stating New York law); *Independent Petrochemical Corp. v. Aetna Casualty and Surety Co., 654 F. Supp. 1334, 1357-58 (D.D.C. 1986)* (same); *Aetna Casualty & Surety Co. v. Abbott Laboratories, Inc., 636 F. Supp. 546, 548-49 (D. Conn. 1986)* (same); *Savoy Medical Supply Co. v. F&H Mfg. Corp., 776 F. Supp. 703, 710 (E.D.N.Y. 1991)* (following AHP's injury in fact trigger); Continental Casualty Co. v. Rapid American Corp., No. 44651, slip op., 1992 LEXIS 2737 (1st Dep't Feb. 25, 1992). Under this approach, "coverage [is] based upon the occurrence during the policy period of an injury in fact." In other words, when the injury actually occurs, each policy then in effect is triggered. It is of no consequence whether the injury has been discovered or not. "[A] real but undiscovered injury, proved in retrospect to have existed at the relevant time, would establish coverage, irrespective of the time the injury became [diagnosable]."

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[13] Other principal theories include the exposure theory, the manifestation theory, and the continuous or multiple trigger theory. See Developments in the Law, Toxic Waste Litigation: Bankruptcy and Insurance Issues, 99 *Harv. L. Rev., 1458, 1579-81 (1986)* (summarizing theories).

AHP, 748 F.2d at 766 (quoting *AHP, 565 F. Supp. 1485, 1497 (S.D.N.Y. 1983)*).[14]

Here, asbestos containing materials manufactured by NGC was incorporated in buildings from the mid-1930's until the early 1980's. The products so incorporated were not defective in the accepted sense of the word—they were manufactured to standard and performed the purposes for which they were designed. The damaged caused is a result of the recognition, through developing scientific knowledge, as to their harmful properties. The gravamen of this knowledge is that the existence of ACM in a building creates a health hazard that will require abatement or removal under controlled conditions. In short, this is a case where injury occurs at the time of installation. As soon as asbestos containing materials are installed a problem exists and damage has occurred. Asbestos containing materials are a present hazard, not merely a potential hazard. The "damage" is done. The very existence of ACM in a building constitutes the damage, the injury-in-fact.

Thus, under an injury-in-fact analysis, the injury may be said to occur at the time of installation so that under New York law the insurance in place at the time of the installation will be triggered.

The question of trigger of coverage is not as clear under Texas law. It appears that in Texas certain lower courts have adopted a manifestation trigger theory. See, e.g., *Dorchester Development v. Safeco Ins., 737 S.W.2d 380 (Tex. App. 1987)* (finding that "no liability exists on the part of the insurer unless the property damage manifests itself, or becomes apparent, during the policy period); Carpenter Plastering Co. v. Puritan Ins. Co., No. 87-2435, slip op. (N.D. Tex. Aug. 23, 1988) ("Only the insurer which has coverage at the time the damages first manifest themselves has a duty to . . . provide

[14] Several insurers argue that AHP is distinguishable on the ground that it involved bodily rather than property injury claims. Any merit the argument may have had, however, has been exstinguished by *Olin Corp. v. Insurance Co. of N. America, 603 F. Supp. 445, 448 (S.D.N.Y. 1985)* (applying AHP's injury in fact trigger to property as well as bodily injury claims).

coverage.") The distinction between manifestation and injury in fact, however, is of little importance in the case at hand since application in a realistic sense would demonstrate that manifestation and injury in fact occurred simultaneously.

As noted above, there is little question that the installation of ACM in a building causes the release of fibers and creates a hazardous condition which will ultimately require remediation. While the state of scientific knowledge in earlier times may have prevented everyone involved from perceiving the problem, the existence of the asbestos fibers within the building can not be disputed. Thus, for the purpose of applying a manifestation trigger, it is reasonable to select the date of installation of ACM as the date of manifestation as well as the date of injury in fact. To one with today's knowledge, the damage done to a building in which ACM was installed in 1940 would have been as manifest in 1940 as it is today. Thus, we conclude that, applying the manifestation rule adopted by the lower Courts in Texas, the date of installation should be considered as the date of manifestation.

Even if we were to conclude that the lower courts of Texas might adopt some other period as the appropriate time of manifestation, we are persuaded that if the issues here were presented to Texas' highest court, the Texas Supreme Court, that court would adopt an injury in fact trigger. As the Supreme Court noted in *Commissioner v. Bosch*, 387 U.S. 456, 87 S.Ct. 1776 (1967)

> In diversity cases this Court has held . . . that while the decree of "lower state courts" should be "attributed some weight * * * the decision [is] not controlling * * * where the highest court of the state has not spoken on the point."

Commissioner v. Bosch, 387 U.S. at 465.

We believe the facts of this case demonstrate the lack of wisdom in applying a manifestation trigger that would fix liability on the insurers on the risk when the damage done by the installation of asbestos containing materials was scientifically

perceived. Asbestos was installed in buildings for over a forty-year period without any perception of the damage being done. Here, such a manifestation theory would place the entire burden of those losses on a single group of insurers who were on the risk in a single year. Thus, despite the fact that NGC had paid insurance premiums to a number of companies over the years to insure it against the risk of the type of property damage caused by the installation of ACM, only one group of insurers would be liable. Moreover, NGC, which would be liable for damages caused by over thirty years of its activity would only be able to collect from its insurers the limit of its coverage for a single year. Such a result simply makes no sense.

Another problem with accepting a manifestation theory with respect to damages caused by the installation of a product over a number of years is demonstrated by the following example. If one assumes that for a period of 10 years a manufacturer sold defective pipes that cracked 10 years after installation, manifestation would occur in the 10th year but only with respect to the pipes manufactured in the first year. If the insurance carrier which had written the applicable insurance for the full ten year period were liable only for the damage that was manifest in the cracked pipes, that carrier could cancel its policy in the first year the cracks appeared and thereby escape liability for the injuries that were sure to become manifest over the ensuing nine years when the remaining pipes cracked.

The above analysis demonstrates that an injury in fact trigger provides a more rational method for apportioning insurance carrier liability on the facts presented here than would result from a manifestation theory that attempts to identify a single year in which the damage from asbestos installation became scientifically manifest. Under an injury in fact rationale, each insurance carrier is liable only for the damage resulting from the installation of ACM in the year or years that it was on the risk and NGC has the benefit of the full limits of liability it paid for in the years of installation.

Since, on the facts presented, this result is clearly more rational than that which would flow from a manifestation theory that attempted to isolate a single year as the year of manifestation, and since the present issue has never been addressed by the Supreme Court of Texas, this Court concludes that the Supreme Court of Texas would apply an injury in fact analysis in determining the insurance carriers' liability in the case at bar.

Having concluded that installation of the asbestos containing materials triggered coverage, we must address NGC's related argument that damage continues to occur until the time of removal, and as such, all insurers with policies in effect prior to the time of removal are liable.[15] In other words, under NGC's theory, a single claim would trigger coverage under each and every policy in effect over the entire period from the time that asbestos containing materials were first installed in the buildings at issue until the time those materials are removed. For example, a claim involving a building in which asbestos containing materials were installed in 1943 and removed in 1983 would trigger forty years of coverage.

NGC premises its continuous trigger argument on the assumption that there is actual or potential release of addi-

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[15] As NGC points out, a continuous trigger theory is not incompatible with an injury in fact theory. The latter indicates at which point in time coverage begins, while the former addresses the issue of whether coverage continues beyond that point or thereafter ceases. See Reply Memorandum of Defendant NGC at 15-18. In light of this compatibility, Judge Brown concluded in Asbestos Ins. Coverage Cases:

> This Court believes its [continuous] trigger decision to be at least theoretically consistent with the "injury-in-fact" approach selected by Judge Sofaer in the United States District Court's decision in American Home Products, . . . as modified by the U.S. Court of Appeals for the Second Circuit. . . . This Court simply proceeds one step further in its analysis, and applies the "injury-in-fact" concept to the asbestos medical evidence, thereby establishing in retrospect that undiscovered injury existed during the asbestos exposure period and during the latency period. Asbestos Ins. Coverage Cases, No. 1072, slip op. at 51-52 (Ca. Super. Ct. Jan. 24, 1990) (Statement of Decision Concerning Phase III Issues).

tional asbestos fiber the entire time the asbestos containing material is present in the building.[16] However, this assumption is questionable at best. Indeed, the witnesses with actual knowledge concerning the characteristics and performance of the asbestos containing products at issue—the research personnel who invented, tested, and developed these products—have testified that none of NGC's products would "continuously" emit asbestos fibers from installation until removal. See, e.g., Bieri Dep. (11/22/88) at 87-91; Shull Dep. at 48-56, 75-78; Volk Dep. (11/17/88) at 90; Petersen Dep. at 33-34. Mr. Shull testified that releases of asbestos fibers from NGC's installed building products, if they occurred at all, would occur only sporadically as a result of episodic disturbances, not continuously from the mere presence of the product in the building. Shull Dep. at 78. This testimony is consistent with the testimony of the insurers' expert, Dr. Gordon Bragg. Bragg Aff. at PP14, 221, 28, 30, 32(c)-(d).

Tr. of Jan. 17, 1992, at 38.

Almost conceding the difficulty of proving when, beyond installation, asbestos fibers were actually released in the buildings at issue in the underlying cases, NGC posits that the Court should apply a presumption that continuous release occurred and shift the burden of proof to the insurers to dis-

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16 Specifically, counsel for NGC suggests that the occurrence is the release of fiber and the concomitant contamination of the building and the property in the building and that happens upon installation of the products, it happens when fiber already released is reentrained, picked up by some mechanism, sweeping, mopping, dusting, walking . . . and moved to another portion of the building or other property in the building and, hence, contaminating new and different areas of the building. Or when additional fiber is released from the material that has been installed, either because it has been damaged or vandalized or disturbed during maintenance activities, such as changing light bulbs or pushing ceiling tiles aside to get to duct work and things like that, and they have generally concluded that any one of those three things, installation with the release that comes with that, reentrainment of already released fibers, and new releases coming from the installed material, all constitute accidents and occurrences within the meaning of both the accident based pre-1966 policies and the occurrence based post-1966 policies.

prove the presumed "fact" of continuous occurrence. We need not reach the difficult question of whether NGC's argument is consistent with New York and Texas law.[17]

Even if NGC could establish a factual basis for the assertion that asbestos fibers are released continuously, this would still not provide a predicate for a continuous trigger theory in the context of asbestos-in-building claims. The gravamen of the underlying cases is that from the tme of installation the presence of friable asbestos products in buildings creates an unsafe condition by exposing building occupants to a potential risk of bodily injury. The damages flowing from the installation of ACM, i.e., the costs of removing or encapsulating the in-place asbestos—does not arise incrementally, cumulatively, or continuously, and is in no sense an injurious process during the course of which the property damage somehow develops or progresses from an incipient to a fully developed state. Since the recoverable damages sought is the costs of removal or encapsulation, the additional property damage can not reasonably be said to occur at the time of each fiber release, much less to occur continuously.

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[17] Interestingly, rather than citing any New York or Texas case for its burden shifting argument under a continuous trigger theory. NGC cites the California case of Asbestos Ins. Coverage Cases, No. 1072 (Cal. Super. Ct. Aug. 29, 1988), slip op. (Tentative Phase V-A Decision), in which Judge Brown shifted to the insurers the burden of proof as to whether fiber release occurred during any policy period. This ruling has since been revised. Importantly, the earlier burden shifting analysis was rejected, cutting against NGC's argument:

> The evidence presented to this Court indicates that property damage from ACBM [asbestos containing building materials] is not always continuous. . . . For this reason, the Court cannot adopt a comprehensive "continuous trigger" approach as to which policies owe a duty to defend. . . . The Court finds that the duty to indemnify is triggered when . . . [the insured] proves an occurrence during the policy period to which it is held liable. . . . As with the duty to defend, the Court declines to adopt a comprehensive rule stating that all policies from the time of installation until the time of removal of ACBM owe a duty to indemnify for property damage.

Finally, the Court notes the paucity of legal support for the continuous trigger theory" in general. The continuous trigger theory was first announced in *Keene Corp. v. Insurance Co. of N. America, 667 F.2d 1034 (D.C. Cir. 1981)*, cert. denied, *455 U.S. 1007, 102 S.Ct. 1644 (1982)*, in the context of an asbestos-related bodily injury coverage case. Keene, however, has been roundly rejected by most jurisdictions considering its merit. In American Home Products, for example, when applying the injury in fact standard, the court rejected Keene as "result-oriented" and ruled that "relying on social policy to justify imputing an expectation of complete coverage to the insured is . . . legally insupportable." *AHP, 565 F. Supp. at 1511. In Abex Corp. v. Maryland Casualty Co., 790 F.2d 119 (D.C. Cir. 1986)*, the very court that decided Keene, applying New York law, found the Keene decision "inconsistent with both American Home Products and [the court's] reading of the insurance contracts" and adopted an injury in fact trigger for asbestos-related bodily injury claims. *Abex Corp., 790 F.2d at 121*. See also *Zurich Ins. Co. v. Northbrook Excess & Surplus Ins. Co., 145 Ill. App. 3d 175, 194 494 N.E.2d 634, 645 (1st Dist. 1986)*, aff'd sub nom., *118 Ill. 2d 23, 514 N.E.2d 150 (1987)* (continuous trigger is "nothing more than a 'result-oriented' exercise in judicial legislation"); *Young v. Insurance Co. of N. America, 870 F.2d 610, 611-12 (11th Cir. 1989)* (rejected Keene under New York law in property damage case in which no injury to property occurred during the policy period); *Hancock Laboratories, Inc. v. Admiral Ins. Co., 777 F.2d 520, 524-25 (9th Cir. 1985)* (rejecting Keene in bodily injury context); *Eagle-Picher Indus., Inc. v. Liberty Mutual Ins. Co., 682 F.2d 12, 23 (1st Cir. 1982)*, cert. denied, *460 U.S. 1028, 103 S.Ct. 1279 (1983)* (rejecting Keene and adopting manifestation trigger for asbestos bodily injury claims); *Aetna Casualty & Surety Co. v. Abbott Laboratories, Inc., 636 F. Supp. 546, 548-49 (D. Conn. 1986)* (adopting injury in fact trigger and rejecting continuous trigger); Pittsburgh Corning Corp. v. Travelers Indem. Co., No. 84-3985, slip op. (E.D. Pa. Jan 20, 1988) (rejecting continuous trigger in context of asbestos property damage claims).

Despite this nearly unanimous rejection of Keene, NGC argues that two minority cases should sway the Court to apply a continuous trigger theory. The first case NGC relies on, however, carries little weight. In *Lac D'Amiante du Quebec, Ltee. v. American Home Assurance Co., 613 F. Supp. 1549 (D.N.J. 1985)*, vacated, *864 F.2d 1033 (3rd Cir. 1988)*, the court followed Keene without any analysis of the distinct property damage issue. Similarly, the second case NGC relies on, *Dayton Independent School District v. National Gypsum Co., 682 F. Supp. 1403, 1408-09 (E.D. Tex. 1988)*, vacated sub nom., *W.R. Grace & Co. v. Continental Casualty Co., 896 F.2d 865 (5th Cir. 1990)*, merely adopts without questioning Keene and Judge Brown's preliminary ruling in Asbestos Insurance Coverage Cases. As indicated, Dayton has since been vacated. Finding neither these nor any other cases NGC cites persuasive on the issue of continuous damage, the Court declines to adopt such a theory. Accordingly, we conclude that an injury in fact trigger is applicable and that this trigger only implicates policies in effect at the time of injury.

V. The Exclusions

Finally, we address the applicability vel non of the various policy exclusions relied upon by the insurers as coverage defenses. We note at the outset that New York law and Texas law are different as to the allocation of proofs in the area of exclusions. Under New York law, an insurer bears the burden of demonstrating that a particular exclusion applies to bar coverage. *Vargas v. Insurance Co. of North America, 651 F.2d 838, 840 (2d Cir. 1981)*. Under Texas law, by contrast, once an insurer pleads an exception to the insurance policy coverage, the burden shifts to the insured to show that the occurrence did not fall within the exception. *Travelers Indem. Co. v. McKillip, 469 S.W.2d 160 (Tex. 1971)*. Importantly, both jurisdictions construe ambiguity in exclusions against the insurer. *Vargas, 651 F.2d at 839-40; Brooks, Tarlton, Gilbert, Douglas & Kessler v. U.S. Fire Ins. Co., 832 F.2d 1358, 1364*

(5th Cir. 1987); *Ranger Ins. Co. v. Bowie, 574 S.W.2d 540 (Tex. 1978).*

A. The "Own Products" Exclusion

Several Insurers raise the "own products" exclusion[18] found in their policies as barring coverage for asbestos property damage claims. This exclusion bars coverage for damages sustained by the policyholder's own products and is based on the theory that liability policies are not intended to provide coverage for faulty workmanship, but rather for damage caused by the product to other property. See, e.g., 7A J. Appleman, Insurance Law and Practice, § 4508.01 (1979).

In relying on the "own products" exclusion, the Insurers read the underlying claim as seeking the repair or replacement of "defective" asbestos containing products. Were the relief sought in the underlying claims so simple, there would be some merit to the Insurers' argument. However, as it stands, the Insurers' reading of the underlying complaints is too narrow. The claimants are not solely seeking new, non-defective building materials as the Insurer would like the Court to believe. Rather, the claimants are seeking recovery for damage to their buildings. As such, on its face the "own products" exclusion does not apply. Accord *Dayton Independent School District, 682 F. Supp. at 1412*, Carey-Canada, Inc. v. Aetna Casualty & Surety Co., slip op. at 29-31; Maryland Casualty Co. v. W.R. Grace, slip op. at 47-49; Statement of Decision Concerning Phase V-B Issues, slip op. at 5-7; *Travelers Ins. Co. v. Volentine, 578 S.W.2d 501, 504 (Tex. Civ. App. 1979).* See also Arness & Eliason, Insurance Coverage for "Property Damage" in Asbestos and Other Toxic Tort Cases, *72 Va. L. Rev. 943, 965 (1986).*

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[18] Essentially, this "own products" or "work product" provision excludes from coverage property damage to an insured's products. See, e.g., App. I-A: Tab 8 at K00007, Excl. (n), AMICO; App. I-A: Tab 48 at HG 00003, Excl. (d)(1), Houston General; App. I-A: Tab 5 at 422038, Excl. (b), American Centennial; App. I-B: Tab 87 at 42298, Excl. (c), Republic.

B. The "Sistership" or "Product Recall" Exclusion

Similarly, the "sistership" exclusion[19] is also inapplicable. By its very terms, this exclusion applies only to instances where the insured has withdrawn its products from the market or from use. *Thomas J. Lipton, Inc. v. Liberty Mutual Ins. Co., 357 N.Y.S.2d 705 (1974)*; *Parker Products, Inc. v. Gulf Ins. Co., 486 S.W.2d 610 (Tex. Civ. App. 1972)*, aff'd on other grounds, *498 S.W.2d 676 (Tex. 1973)*. See also *Arcos Corp. v. American Mutual Liability Ins. Co., 350 F. Supp. 380, 385 (E.D. Pa. 1972)*, aff'd mem., *485 F.2d 678 (3d Cir. 1973)*. Moreover, the exclusion has been held inapplicable where the underlying claims allege damage to property other than the insured's products. *Maryland Casualty Co., slip op. at 50-52; Todd Shipyards Corp. v. Turbine Service, Inc., 674 F.2d 401, 419 (5th Cir. 1982)*. Here, it is alleged that damage occurred to the claimants' property. Furthermore, there has been no withdrawal of the product by NGC. As such, the "sistership" exclusion cannot be asserted to limit coverage. Accord Statement of Decision Concerning Phase V-B Issues, slip op. at 8-9 ("by its plain language, the 'sistership' exclusion does not apply to the building cases"); *Dayton Independent School District, 682 F. Supp. at 1412* ("where, as here, a policyholder's products have been withdrawn by a third-party claimant, the 'sistership' exclusion does not apply"); Carey-Canada, Inc., slip op. at 31-32 ("this exclusion is inapplicable" to asbestos property damage cases).

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[19] The "sistership" exclusion bars coverage for damages claimed for the withdrawal or loss of use of the insured's products if such products are withdrawn from use because of a known or susptected defect or deficiency therein. See, e.g., App. I-A: Tab 8 at K00007, Excl. (p), AMICO; App. I-A: Tab 48 at HG 000003, Excl. (e), Houston General.

C. The "Warranty" or "Design Defect" or "Loss of Use" Exclusions

The Insurers next suggest that the "loss of use" exclusion[20] contained in the policies bars coverage. Reliance on this exclusion is misplaced. Quite simply, the exclusion applies only to loss of use claims where damage to property is not involved. Here, damage to property is the very focus of the underlying complaints. As such, the exclusion, by its very terms, is inapplicable. Accord Carey-Canada, slip op. at 34; Statement of Decision Concerning Phase V-B Issues, slip op. at 9, 13.[21] See also 2 R. Long, The Law of Liability Insurance § 11.10 at 11-81 (1987) (warranty exclusion inapplicable to "claims involving physical injury to tangible property, including any los of use of such physically injured property").

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[20] This exclusion bars coverage for:

> loss of use of tangible property which has not been physically injured or destroyed resulting from . . . (b) the failure of the named insured's products or work performed by or on behalf of the insured to meet the level of performance, quality, fitness or durability warranted by the named insured . . . but this exclusion does not apply to loss of use of other tangible property resulting from the sudden and accidental physical injury to or destruction of the named insured's products or work performed by or on behalf of the named insured after such products or work have been put to use by any person or organization other than an insured.

[21] Home Insurance Company asserts its "exclusion (b)", a hybrid of the "loss use" and "own products" exclusion, as also barring coverage. See App. I-A: Tab 44 at 0001548604; Tab 45 at 400344; Tab 46 at 400485. Upon review of the language of "exclusion (b)", we conclude that for the reasons we found the "loss use" and "own products" exclusions inapplicable, we also find "exclusion (b)" inapplicable. Additionally, we note that subsection (iii) of "exclusion (b)" provides that "nothing herein contained shall be construed to exclude claims made against the Insured for personal injuries or property damage . . . resulting from improper or inadequate performance, design, or specification . . ." This clause clearly indicates that claims for property damage are not barred by the exclusion. Accord *Schulman Inv. Co. v. Olin Corp., 514 F. Supp. 572, 574 (S.D.N.Y. 1981)*; Statement of Decision Concerning Phase V-B Issues, slip op. at 12.

D. The "Pollution" Exclusion

Finally, the Insurers' reliance on the "pollution" exclusion[22] contained in various policies is also misplaced.

On its face, the exclusion applies only to the discharge of pollutants "into or upon the land, the atmosphere or any watercourse or body of water." Here, asbestos containing materials were incorporated into the property of the underlying claimants. There have been no allegations of contamination of land or water, and incorporation into a building does not rise to the level of discharge into the atmosphere. See, e.g., Tentative Decision Concerning Phase IV Issues, slip op. at 18-20 (pollution exclusion does not apply to asbestos bodily injury claims because "release of asbestos fibers in the workplace or home cannot reasonably be construed to be a release into the 'atmosphere' "); National Standard Ins. Co. v. Continental Ins. Co., No. 81-1015, slip op. (N.D. Tex. Oct 4, 1983) (exclusion applicable only to claims of injury based on exposure to chemical carcinogens in outside ambient atmosphere and not to exposure in an enclosed environment); *Wilkin III, 578 N.E.2d at 933* ("we do not understand 'the atmosphere' to mean multiple, diverse internal environs or surroundings of individual buildings").

The "pollution" exclusion is also inapplicable by virtue of its limiting clause. This limiting clause provides that the exclusion "does not apply if such discharge, dispersal, release or escape is sudden and accidental." Here, the release of asbestos was clearly sudden and accidental as those terms have been construed by the insurance industry and various

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[22] This provision excludes from coverage:

> Bodily injury or property damage arising out of the discharge, dispersal release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

See, e.g., App. I-A: Tab 7 at 400471 (American Home).

courts. The insurance industry drafted the sudden and accidental language to clarify the "occurrence" definition, which bars coverage for expected or intended damages. Specifically, the drafters explained that coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident. See Letter from Insurance Rating Board to New York Service Purchasers (May 20, 1970) (App. V-B: Tab 19). See also R. Sayler and D. Zolensky, Pollution Coverage and the Intent of the CGL Drafters: The Effect of Living Backwards, Mealey's Litigation Reports: Insurance 4,425, 4,432-34 (1987).

Similarly, courts addressing this issue have limited application of the exclusion to intentional polluters. See, e.g., *National Grange Mutual Ins. Co. v. Continental Casualty Ins. Co., 650 F. Supp. 1404, 1410-12 (S.D.N.Y. 1986)*; National Standard Ins. Co. v. Continental Ins. Co.; *Colonie Motors, Inc. v. Hartford Accident and Indem. Co., 538 N.Y.S.2d 630* (3rd Dep't 1989); *Broome v. Aetna Casualty & Surety Co., 540 N.Y.S.2d 620* (3rd Dep't 1989); *Niagara County v. Utica Mutual Ins. Co., 439 N.Y.S.2d 538 (1981)*; *Allstate Ins. Co. v. Klock Oil Co., 426 N.Y.S.2d 603* (4th Dep't 1980).

In light of our review of the drafting history and relevant caselaw, we conclude that the release of asbestos in the underlying complaints was sudden and accidental within the meaning of the exclusion. As such, the "pollution" exclusion is inapplicable. Accord *Wilkin III, 578 N.E.2d at 933*; Continental Casualty Co. v. Rapid-American Corp., No. 44651, slip op. (N.Y. App. Div. 1st Dep't, Feb. 25, 1992).

CONCLUSION

This opinion has addressed the major issues raised in the motions for summary judgment. The Court will hold a conference with counsel on June 15, 1992 immediately following the conference in the personal injury cases. At this conference a schedule of oral argument on the remaining issues and motions will be set.

SO ORDERED

Dated: May 26, 1992

John S. Martin, Jr., *U.S.D.J.*

SUPREME COURT: NEW YORK COUNTY
IAS: PART 29

Index No 11579/91

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888 7TH AVENUE ASSOC LTD PARTNERSHIP,
Plaintiff,

—against—

AAER SPRAYED INSULATIONS, INC., et al.,
Defendants.

SKLAR, J:

The defendants' application to dismiss the complaint is granted.

FACTS

Construction of the building located at 888 7th Avenue, which is the subject of this lawsuit, was completed in about 1970. During construction the New York Times reported that a subcontractor had been served with an order to show cause obtained by New York City's Department of Air Resources to enjoin the spraying of asbestos insulation, since the subcontractor failed to comply with recent regulations issued by the department. The department alleged that asbestos exposure caused cancer. Motion, exh. B.

In 1973 the United States Environmental Protection Agency sponsored a study, undertaken by the Mount Sinai School of Medicine, of buildings across the country, including ten in New York City, to decide whether asbestos fireproofing which was present in those public buildings contaminated the air in those buildings. 888 7th Avenue was one of the buildings

included in the study. The results of that study were published in 1975 and were made publicly available. The purpose of the study was to ascertain 'whether erosion of asbestos from different types of spray fireproofing occurred' and to assess "the potential health effects from such contamination." Motion, exh. D, p 4. The abstract (motion, exh D) of the study indicated that through erosion or damage "significant contamination can occur in the air supply systems of buildings in which fibrous type dry spray asbestos- containing fire-proofing materials were used." The fireproofing used in the construction of 888 7th Avenue was of that type.

The study indicated (at p 23) that, while most of the samples taken showed no significant distinction between the asbestos concentration measured from within a particular building and from without, in several buildings, including 888 7th Avenue, "the possibility of indoor contamination exists," and that the average indoor air values at that building were at least three times greater . . . than concentrations measured outside. Ibid. The Mt Sinai research team noted, with respect to the health effects, that "[d]ata are accumulating that exposure to asbestos in other than occupational circumstances is sufficient to produce disease" and that "the higher levels observed in some buildings in this study should be viewed with concern." Id pp 14-26. The report recommended, inter alia, that "more extensive sampling and analysis for asbestos" be carried out in buildings using fibrous spray fireproofing, to detect the full extent of contamination (Id. p 40), that research be undertaken to find effective filtration systems, and that procedures be developed to minimize contamination during maintenance activities, and for removal of asbestos because of "unacceptable contamination." Id p, 41. The study also recommended that the propriety of EPA demolition procedures for buildings with spray asbestos be verified. Ibid.

In November 1979 plaintiff, 888 7th Avenue Associates Limited Partnership (the "owner") purchased the building, allegedly unaware of the EPA study. Tippetts affidavit, p 2. In 1985 Local Law 76 was passed, effective April 1, 1987. The purpose of the law was to safeguard the public health from

the deleterious effects of airborne asbestos fibers caused by the performance of renovation and demolition projects without adequate safeguards. Thus, when contemplating renovation or demolition of a building where such work would disturb a specified amount of friable asbestos, the owner was required to ascertain whether asbestos was present and, if so, its condition, and to provide plans for the safe removal or encapsulation of the asbestos if it would become airborne as a result of the work.

By way of background information only, gleaned from the county clerk's file in a related action commenced in 1988 against the owner of this building by Rapid American Corporation, one of its tenants, I note that evidently in about 1986 Rapid American Corporation, while in the midst of renovations, was informed by the owner's managing agent of the newly passed Local Law 76, and that the tenant should be alerted to this law in connection with any further renovations. Ackerman affidavit ¶7. Thus Rapid engaged experts, including ATC laboratories, in February 1987 to ascertain the presence of asbestos in the leased premises. Id, ¶8. ATC in its report advised that asbestos containing material was present throughout the premises and that at least some of the material was in "fair to poor shape," and was "highly friable." Id ¶9. Rapid in 1986 and in early 1987 allegedly insisted that the responsibility for removing the asbestos was the owner's but the owner allegedly insisted that it was Rapid's (Id ¶11). Thus in April 1987 Rapid advised the owner's managing agent by letter that it was the landlord's responsibility under the lease. Id, exhs 4, 5. The owner's managing agent responded in a letter dated May 5, 1987 that any work was not its responsibility. Id, exh 5.

Meanwhile, as is acknowledged by a vice president of the owner's managing agent in opposition to the instant motion, in anticipation of Local Law 76 becoming effective the managing agent retained Kaselaan & D'Angelo in March 1987 to prepare an "Asbestos Operations and Maintenance Program" for the building. Tippetts affidavit, pp 3-4. The managing agent also worked with Detail Associates, an environmental

consultant, in preparing an Asbestos Management Program based on the requirements set forth in Local Law 76. A first draft was issued by Detail Associates on May 21, 1987. Tippetts affidavit, p 3.

Rapid did the asbestos removal work and in 1988 sued the landlord seeking, under Rapid's first two causes of action, a determination that the landlord had the duty under the lease to remove the asbestos, and reimburse Rapid for the work performed by Rapid. By a decision dated June 19, 1991 (Altman, J), Rapid was granted partial summary judgment as to those first two causes of action.

While Rapid's action was pending, the owner commenced this action in October 1990 against various companies which, inter alia, mined, produced, sold and installed asbestos containing material (ACM) which was used in constructing the building—in the form of fireproofing (complaint, ¶69). The complaint alleges that:

> There are numerous common daily activities in the Subject Building, including normal wear and tear, aging, abrasions, contacts and impacts with asbestos and asbestos-containing materials in the course of the normal and expected use of the Subject Building, which can damage asbestos-containing materials present in the Subject Building and exacerbate the deterioration of asbestos-containing materials and cause asbestos fibers to become airborne or to be released in the Building. ¶65.

and that:

> "Asbestos fibers once released may contaminate the Building environment." ¶64.

The complaint further alleges that defendants knew or should have known from studies conducted since the mid-1920s that ACM was hazardous to the health of people such as those using and occupying the building in issue (¶¶80, 83): that defendants placed ACM into the stream of commerce knowing "that once installed they would begin to release

asbestos fibers rendering necessary the testing, removal and replacement of said asbestos containing materials" (¶73), and that at the time the ACM was purchased or installed, or at the time the plaintiff-owner purchased the building from the prior owner, neither the owner nor its predecessor "knew, or had reason to know, of the dangers of the emission of asbestos fibers or the risks associated with the inhalation of asbestos of asbestos fibers" (¶74).

The complaint (¶60) then alleges, cryptically in terms of a time frame, that "[d]uring this period and continuing to the present and into the future asbestos fibers have damaged and continuously and repeatedly will cause damage to the Subject building." Plaintiff claims that as a result of the use of ACM it has been injured in that it has incurred and will incur the cost of detecting, containing or removing asbestos, the value of the building has been diminished, and plaintiff may be liable for personal injuries which may be suffered by third parties. Complaint ¶78.

THE INSTANT MOTION

Defendants now move to dismiss the entire complaint which asserts ten "causes of action." Defendants seek to dismiss the negligence, strict liability, prima facie tort, market share, concerted action, express warranty, implied warranty and fraud claims on statute of limitations grounds. They also seek to dismiss the fraud claim for a lack of specificity. With respect to the "causes of action" for market share and concerted action, defendants further observe that these are not causes of action but are merely burden shifting theories. Finally, defendants seek dismissal of plaintiff's restitution and indemnity claims on the sole and limited ground (See: defendants' reply memo, p 30, fn) that, since none of plaintiff's other causes of action is viable and since plaintiff has not alleged any other source of duty on defendants' part, these equitable claims of restitution and indemnity are not viable.

Initially it must be noted that plaintiff did not submit any objection to that portion of defendants' motion which sought dismissal of the fraud claim and, on oral argument, plaintiff's

counsel did not dispute defense counsel's assertion that plaintiff has not offered any opposition with respect to the fraud claims. OA transcript, p 20. Accordingly, the fraud claim is dismissed. Also, plaintiff conceded that concerted action and market share are not causes of action. Plaintiff's memo of law, p 16. So, to the extent that they are pleaded as separate causes of action, they are dismissed as such. Since the applicability of these burden shifting theories to plaintiff's remaining causes of action is not before me (See defendants' memo of law, p 7, fn), I shall not decide that issue.

That branch of defendants' motion which seeks dismissal of plaintiff's express and implied warranty causes of action on the ground that they are barred by the four year statute of limitation is granted, since such causes of action accrue "when tender of delivery is made" [Heller v US Suzuki Motor Corp, 64 NY2d 407, 410 (1985); Tavares v Hobart Waste Compactor, Inc, 151 AD2d 251 (1st Dept, 1989)], and since it is undisputed that at latest such tender of delivery was made when the building was completed in approximately 1970 (plaintiff's memo of law, p 3), about twenty years before this action was commenced.

The defendants assert that plaintiff's negligence, strict liability and prima facie tort claims are governed by the three year statute of limitations set forth in CPLR §214, and that since the injury, namely the release of asbestos fibers into the air, started at least in 1973 when the study was conducted, the statute of limitations expired long before this action was commenced. Defendants further assert that even if knowledge of the release was needed to start the accrual of the action, which defendants dispute, those causes of action were still time barred because the owner's predecessor in interest was aware or should have been aware at least from the 1975 EPA report that the building contained a high level of asbestos suspended in the air which posed a potential health threat. The defendants assert that even assuming arguendo that CPLR §214-c is applicable, which defendants also dispute, the owner was aware at least from March 1987 when the owner hired its own asbestos consultant or May 1987, when the

owner's consultant Detail Associates prepared its draft of an asbestos management program for the building, i.e., more than three years before this action was commenced, that plaintiff had suffered an injury from asbestos. Accordingly, defendants urge that even under CPLR §214-c plaintiff's negligence, prima facie tort and strict liability claims are time barred.

In response, the owner claims that it was unaware of the EPA report until it was appended to the moving papers. The owner further claims that it was unable to identify the manufacturers of each specific asbestos product used in the building and that technical and scientific knowledge is still insufficient to do so, and thus CPLR §214-c(4) applies. The owner also asserts that its claims accrue and that it suffers "injury" only when it takes steps to abate the condition and incurs a financial loss" [Schlesinger affirmation, p 3; oral argument transcript, pp 9-10, 13], regardless of whether the owner expended money to remedy the problem in 1988, or will first expend money seventy-eight years from now or even two hundred and fifty years from now (OA transcript, pp 13-14, 16). The owner also asserts that at the time Local Law 76 went into effect "no 'injury' sufficient to start the accrual of the statute of limitations had yet occurred." Plaintiff's memo of law, p 8, emphasis added. Thus the owner asserts its negligence, strict liability and prima facie tort claims are timely.

The court does not agree. The owner's injury does not occur when it undertakes renovation or demolition and pays for the abatement of friable asbestos in connection with that renovation or demolition project. To hold as plaintiff urges would allow a plaintiff to decide when its injury will occur even, for example, 250 years from now, thereby undermining the policy of repose upon which the concept of the statute of limitations is based. In addition, plaintiff's complaint is specifically premised on the notion that "normal wear and tear, aging, abrasions, contacts and impacts . . . in the normal and expected use of the building will damage and cause the ACM to deteriorate and cause fibers to become airborne, and that once released these fibers damage the building."

Complaint, ¶¶63-65. The complaint further alleges (¶¶73, 74) that "once installed" the defendants knew the AMC "would begin to release asbestos fibers rendering necessary the testing, removal and replacement" of the ACM, and that defendants knew of the dangers of the emission of asbestos fibers. Thus the complaint is premised on the injury occurring soon after installation, not when the owner expended money. Indeed, plaintiff tacitly acknowledges that it was injured before it began to spend money to remedy the problem since it admits that it was not "sufficiently" injured for these claims to have accrued. The law is well settled that exacerbation of an injury does not give rise to new causes of action. New York Seven-Up Bottling Co, Inc v Dow Chemical Co, 96 AD2d 1051, 1052 (2d Dept. 1983); aff'd 61 NY2d 828 (1984) Moreover, that the complaint (¶78) alleges that the owner not only has in the past but will in the future incur the costs of inspecting and containing or removing the asbestos highlights the fact that the ultimate amount of damages does not have to be known with exactitude before a plaintiff is capable of commencing such an action.

Plaintiff's negligence, strict liability and prima facie tort claims accrued "when all of the facts necessary to the cause of action have occurred so that the [plaintiff] would be entitled to obtain relief in court" (Aetna Life and Cas Co v Nelson, 67 NY2d 169, 175). Here, according to the theory set forth in the complaint the owner's predecessor in interest was injured essentially when the normal daily wear and tear caused the ACM to break down and release fibers into the air, and certainly by the time the EPA issued its report in 1975, which revealed the high concentration of asbestos fibers in the building's air.

In addition, CPLR §214 is applicable and CPLR §214-c is inapplicable because defendants' acts and omissions which allegedly caused the owner's injury occurred before July 1, 1986, the injury was or should have been discovered before that date and the owner's claims were time barred before that date. CPLR §214-c(6) The owner does not dispute that the EPA study was conducted with the knowledge and help of the

prior owner or that the prior owner was aware of or should have been aware of the results of that study. Since the current owner would be bound by any statute of limitations by which its predecessor was bound [See:Bucklin v Bucklin, 40 NY (Keyes) 141, 150 (1864)], and since the three year statute of limitations for any negligence, strict liability or prima facie tort* claims that the prior owner could have asserted has expired, the current owner's claims are untimely.

Nonetheless, even assuming arguendo that the injury did not accrue before July 1, 1986 and/or that the prior owner did not discover or reasonably should not have discovered any injury before that date, these claims are time barred under CPLR §214-c because plaintiff clearly knew that it was injured [See:First Bible Baptist Church, Inc v Gates Chili S.D. __AD2d__ (4th Dept, 1991); 569 NYS2d 313] when it hired and presumably paid asbestos consultants in early 1987 to deal with its asbestos problem. As noted above, one of those consultants issued its first draft of the proposed policy to manage the asbestos on May 21, 1987, more than three years before this action was commenced. Thus, even under CPLR §214-c(2) these causes of action are time barred.

The owner's claim that CPLR §214-c(4), which extends the time to commence the action where the "cause of the injury" is discovered after the injury itself, is applicable because plaintiff did not know which of the defendants was responsible for the asbestos, is without merit. While the phrase "cause of the injury" is somewhat ambiguous all that it implies is that the plaintiff has "sufficient knowledge to bring an action." (See: McLaughlin's Prac Comm C214-c:4 p 635). Here plaintiff was able to commence this action even though it claims that technical knowledge is still unavailable to establish which defendant furnished the asbestos. Moreover, I note that as a general rule in asbestos property damage litigation of this type, plaintiffs do not know which suppliers of asbestos were involved when their actions are commenced so

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* It is undisputed that the statute of limitations for the prima facie tort claim under CPLR §214 is three years. See: McLaughlin, Prac Comm, C214:5, p 527; McKinney's Cons Laws of NY, Book 7B, 1990.

they usually sue all known suppliers and through discovery hopefully learn which entities were involved.

In addition, plaintiff has failed to allege in its complaint or prove via competent expert evidence, as required by CPLR §214-c(4), that the cause of its injury could not be ascertained. The owner's managing agent merely asserted in hearsay fashion that "we were advised by the experts . . . that there existed insufficient technical or scientific knowledge or information to identify such manufacturer." Tippett affidavit, p 5. Accordingly, the negligence, strict liability and prima facie tort claims are dismissed.

Defendants, relying on the interim and final decisions in City of New York v Keene Corp [interim order of Nov 19, 1985 (Wallach J), index #44559/84; 132 Misc2d 745, 747-49 (Sup Ct. NY Cty, 1986), aff'd 129 AD2d 1019 (1st Dept. 1987)], assert that since none of the foregoing causes of action is viable, plaintiff's two equitable claims for indemnity and restitution must be dismissed. In Keene (supra) I, in the later decision, agreed with Justice Wallach's conclusion set forth in his interim decision that the breach of duty on the defendants' part needed to sustain these causes of action could be found in any other viable cause of action. Here a breach of duty on defendants' part cannot be established since all of plaintiff's claims against defendants are no longer viable. While plaintiff asserts that the viability of its claims, vis-a-vis the statute of limitations, is immaterial and that all that is relevant is whether they are substantively provable, I do not agree. To hold otherwise would effectively mean that whenever a party creates a hazardous condition on another's property via a breach of duty arising out of concepts of negligence or strict liability, the statute of limitations would not begin to run on the indemnity and restitution claims until the owner of that property decided to spend money to remedy that hazard, even if the underlying negligence and strict liability claims were time barred long ago.

To permit these indemnity and restitution claims, when the underlying claims upon which the breaches of duty are premised were time barred, would undermine the purposes of

the statute of limitations. Moreover, if the legislature intended such a result as is urged by plaintiff there would have been no need to enact the remedial revival provision (See: McKinney's Sess Laws 1986, ch 682 §4) or CPLR §214-c, as they relate to claims arising from injury to property caused by the latent effects of exposure to substances such as asbestos since effectively such actions would never be time barred until the property owner decided to remedy the hazardous condition. Accordingly, the indemnity and restitution claims are dismissed as are the plaintiff's other claims.

Settle order.

/s/ [ILLEGIBLE]
J.S.C.

Dated: 2/24/92

SUPREME COURT: STATE OF NEW YORK
TRIAL TERM: PART 23

Index No. 44559/84
Interim Order No. 1

THE CITY OF NEW YORK and THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Plaintiffs,

—against—

KEENE CORPORATION, et al.,

Defendants,

WALLACH, RICHARD W., J.:

Motion by defendants under CPLR 3211(a) (7) to dismiss the complaint in its entirety for failure to state a cause of action is granted to the extent indicated below.

Strict Liability and Negligence: Dismissal of the third (negligence) and fifth (strict product liability) causes of action is sought on the ground that the cost of repairing or replacing a defective product is an "economic loss" not recoverable in tort unless the defect has caused an accident resulting either in physical damage to other property or personal injury. With this broad proposition the court does not agree. A rational system of product liability law ought not to depend on the Pickwickian "luck" of having an accident; nor should it require damages that are large and immediate. Rather, a remedy should be available the moment a loss is sustained

under circumstances, accidental or not, that make the product dangerous.

What kind of damage may be necessary before a cause of action in strict product liability accrues has not developed as far in New York as elsewhere. Out-of-state cases supportive of the above position most relied upon by the court are: *Pennsylvania Glass Sand Corp.* v. *Caterpillar Trader Co.* (625 F2d 1165); *Northern Power & Engineering Corp.* v. *Caterpillar Tractor Co.* (623 P.2d 324); *Shooshian* v. *Wagner* (672 P.2d 455, applying *Northern Power* in a toxic substance setting); and *Pearl* v. *Allied Corp.* (566 F. Supp. 400, applying *Penn Glass* in a toxic substance setting). Like New York, Pennsylvania and Alaska are jurisdictions that have adopted the *Sealy* doctrine barring recovery of economic loss under a strict liability cause of action. These cases recognize that although non-accidental causes of property damage (i.e., product deterioration and breakdown), especially when coupled with a demand for relief seeking only repair and replacement costs, are indicative of economic loss, neither the manner in which damage is sustained nor the particular items for which damages are sought ought to be determinative. It is impossible to formulate an all-inclusive rule to distinguish property damage from economic loss. Rather, analysis should proceed on the basis of interrelated factors, such as the nature of the defect, the type of risk posed, and the manner in which the injury arose, all toward the end of ascertaining whether it is the policy of tort or contract law that is implicated (see, Penn Glass, supra, at 1173; Northern Power, supra, at 328). Safety is the traditional concern of tort (Penn Glass, supra, 1169; Northern Power, supra, 328). This is because "[a] consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market." (Schiavone Construction Company v. Elgood Mayo Corp., 81AD2d 227, 231, reversed on dissenting opinion, 56 NY 2d 667, quoting Sealy v. White Motor Co., 63 Cal. 2d 9, 15, 16, 18). The law does not require a buyer to bargain for a safe product. He has the right to such a

purchase correlative to the manufacturer's duty to provide a safe product (Penn Glass, supra, at 1175). This is the basic premise of product liability law.

Although a sudden calamitous event or a violent collision with external objects will almost always result in property damage, such an occurrence is not an indispensable element to a cause of action in strict product liability (see, Northern Power, supra, at 328). Indeed, strict liability does not even require damage in the sense of physical injury to property or persons. All that need be alleged is a danger certain to eventuate in physical damage if the product is not repaired or replaced, and repair or replacement costs. The concept has been expressed in these terms:

> "Insofar as the premise of responsibility for the marketing of a dangerously defective product states a norm for the producer and seller, that norm either has or has not been met at the time the product is sold. Whether the seller has met this responsibility cannot depend on the fortuitous extent of the damage done when the danger created by the defect subsequently comes to pass . . .
>
> [T]his does not imply that once a product is dangerously defective, its seller is liable for any and all losses consequent upon its use. The premise of his liability also controls its extent. The loss must be a consequence of the kind of danger and occur under the kind of circumstances, 'accidental' or not, that made the condition of the product a basis for strict liability. This distinguishes such a loss from economic loss due only to the poor performance or the reduced resale value of a defective, even a dangerously defective, product. It is the distinction between the disappointed users . . . and the endangered ones . . . "

(Northern Power, supra, at 328, quoting Russell v. Ford Motor Co., 575 P.2d 1383, 1386-1387).

Thus the First Department in *Trustees of Columbia University* v. *Mitchell/Giurgola Associates* (109 AD2d 445) permitted recovery of repair costs in tort not because the wall was in a state of imminent collapse at the time such costs were incurred, but because collapse, imminent or not, was certain to occur if repairs were not undertaken. That the danger created by the defective component parts did not become manifest until the wall had reached the point of imminent collapse was fortuitous. The danger could have manifested itself earlier, and, if it had, there is no reason in principle why a recovery should not have been allowed for repair of the same defects having the same potential for causing the same damage. In contrast, the defects in the truck hoist involved in *Schiavone* were not alleged to have posed any danger to the truck itself, or to other property or persons (see, Shooshanian, supra at 464 distinguishing Northern Power). The hoist simply did not operate as it was supposed to, with the result that plaintiff had to expend money to put it into reasonably operable condition, and sustained other business losses attributable to downtime, loss of production, additional labor, and equipment rentals.

The exercise required by the Sealy doctrine is one of line-drawing. At first it was thought that a cause of action in strict product liability should be limited to personal injury (see, Northern Power, supra, at fn. 3). Then it was thought that an accident was indispensable to the cause of action, but that too has been discarded by courts working under the *Sealy* doctrine (id. at fn. 5). Must the line in every case be demarked by physical damage or injury? A qualitative defect, such as in the wall in *Trustees of Columbia* (supra), or the roof in *Hemming* v. *Certainteed Corp.* (97 Ad 2d 976, 4th Dept.), or the siding in *Queensbury Union Free School District* v. *Jim Walter Corp.* (94 AD 2d 834, 3rd Dept.), can be very dangerous indeed, and none the less so because qualitative in nature. In such cases the court must determine whether the complaint implicates more the safety interests of tort law or the expectation interests of contract. Here, there is no claim that the

defect was qualitative in nature, i.e., that the asbestos products did not perform suitably as, for example, insulation. Rather, plaintiffs claim that while defendants' products always worked fine, they posed a danger from the moment they were incorporated into the school buildings, and that the danger was growing progressively worse. Given the nature of the risk, must plaintiffs have waited until the asbestos had flaked and deteriorated to the point that it could no longer function as insulation before being entitled to relief, and then only in contract? As in *Trustees of Columbia*, the focus here is clearly on the danger posed, and not the failure of the product to function as expected. That the danger has not yet manifested itself in personal injury is a mere fortuity that ought not to deprive plaintiffs of relief in tort.

Moreover, other courts have found physical damage to property in analogous circumstances. The complaint can be properly construed as alleging that plaintiffs' buildings have been contaminated by asbestos; that the contamination has physically altered plaintiffs' buildings so as to have made them harmful to health; that the extent and imminence of the threat is not known, but it was certain to become progressively worse had plaintiffs not incurred the repair and replacement costs they seek to recover herein; that to remove the threat plaintiffs have had to tear down and replace portions of their buildings; and that this cost of retrofitting their buildings so as to make them safe is the measure of plaintiffs' property damages (see, Shooshanian, supra, at 463-464; Pearl, supra at 402).

Nuisance: The second cause of action for nuisance alleges nothing not alleged in the other causes of action, although it does stress that the health threat posed will continue unless the asbestos is removed, and that it grows more acute over time as the asbestos is allowed to deteriorate. This is merely to describe the nature of the danger plaintiffs face from defendants' products. The problem is that, notwithstanding the incorporation of all preceding allegations of the complaint, the cause of action for nuisance does not describe the conduct

of defendants that makes them liable for losses incurred by plaintiffs as a result of the danger. If plaintiffs are saying that defendants are liable because they negligently injected into the stream of commerce a not reasonably safe product, then the cause of action is actually one for negligence and need not have been separately pleaded (Copart Industries, Inc. v. Consolidated Edison Company of New York, Inc., 41 NY 2d 564, 569). If, on the other hand, plaintiffs are saying that defendants marketed asbestos indifferent to the potential danger (complaint par. 34, alleging that defendants knew of the danger posed by asbestos products but nevertheless marketed them "motivated by a desire to extract unwarranted pecuniary and economic gain and profits"), it is preferable that plaintiffs pursue such claim by way of a demand for punitive damages under their cause of action for fraud. The facts here do not fit the usual pattern for nuisance actions. Nuisance is based on the maxim that "a man shall not use his property so as to harm another," (Little Joseph Realty, Inc. v. Town of Babylon, 41 NY 2d 738, 744). The entire charge to the jury is structured upon that proposition (PJI 3:16).

Nor is there any basis for holding defendants liable for a public nuisance. If the asbestos in a school building posed a threat to a passersby on the public sidewalk outside the school, then there might be a public nuisance. The state may be concerned with the presence of asbestos in the public schools, but more so in its administrative relationship to the schools than as the protector of the public health, safety and welfare. In the latter capacity, the State's concern would be with asbestos contamination in the community at large. But there is nothing alleged in the complaint to suggest that the action is brought for the purpose of vindicating the public's right to be rid of asbestos in the environment.

Fraud: Plaintiffs are correct that the line of cases cited by defendants in support of dismissal of this fourth cause of action has only to do with the applicability of the statute of limitations (New York Seven-Up Bottling Co. v. Dow Chemical Co., 96 AD 2d 1051, aff'd 61 NY 2d 828; Cabrini Medical Center v.

Desina, 64 NY 2d 1059; Queensbury Union Free School District v. Jim Walter Corp., 101 AD 2d 792, aff'd 64 NY 2d 964; Quinn v. Hoover & Strong, Inc., 96 AD 2d 1145). It is doctrine that the statute of limitations bars the remedy, not the underlying right. If the same remedy is sought under different theories, it becomes necessary to determine the "essence" of the action because a single remedy can have but a single period of limitation. Such an inquiry requires an examination of the one aspect of a complaint not normally considered on motions to dismiss for failure to state a cause of action—the relief clause (Sears, Roebuck & Co. v. Enco Associates, Inc., 43 NY 2d 389, 396; 3 Weinstein, Korn & Miller, New York Civil Practice §3017.02). This being a CPLR 3211(a)(7) motion, the period of limitations applicable to the repair and replacement costs sought to be recovered is of no consequence to the court, and the "essence" of the action need not be considered.

As a pleading, however, the fraud cause of action fails to give notice of the transactions and occurrences intended to be proved (CPLR 3013) much less any details of the surrounding circumstances (CPLR 3016[b]). Indeed, the only particulars given are that defendants, "through advertisements and otherwise", represented their asbestos products to be safe when they knew otherwise "since at least 1929". Defendants, most of whom have appeared separately, cannot be expected to prepare their respective defenses on the basis of this kind of notice. There are no sufficient allegations of concerted action, yet it appears that plaintiffs would hold each of the defendants liable for any representations made by each and every of the others (see, Glatzer v. Rocco Scappatura, 99 AD 2d 505). And the allegation of scienter "since at least 1929" is wholly conclusory (see, Credit Alliance Corporation v. European American Bank and Trust Company, 65 NY 2d 536, 554). What happended in 1929 that apprised defendants of the dangers of asbestos? At a minimum that event must be specifically alleged to meet the regulations of CPLR 3016(b).

Restitution: The operative allegation in this first cause of action is the existence of a legal duty on plaintiffs' part to

remove asbestos from the schools. Nowhere, however, is the source of this duty identified (though in their brief plaintiffs do state that it lies in a "broad general long honored obligation to protect the health and safety of school children in their charge", as well as in the School Asbestos Safety Act [Education Law, §430 et seq.] and the Asbestos School Hazard Detection and Control Act [20 USC §3601 et seq.]). If plaintiffs are able to allege the source of their duty to discharge an obligation that ought to have been assumed by defendants, a cause of action for indemnity may lie (State of New York v. Stewart's Ice Cream Company, Inc., 64 NY 2d 83). The breach of duty on defendants' part necessary no such a cause of action may be found in any of plaintiffs' other viable causes of action (McDermott v. City of New York, 50 NY 2d 211).

Accordingly, the sixth (implied warranty), seventh (express warranty) and eighth (conspiracy) causes of action are dismissed without opposition; the second (nuisance) cause of action is dismissed with prejudice; the fourth cause of action (fraud) is dismissed without prejudice to plaintiffs making a motion, within 90 days after receipt of a copy of this decision and order, for leave to serve an amended complaint, such motion to include a copy of the proposed amended complaint accompanied by disclosure of evidentiary facts showing good ground to support a cause of action for fraud (see, Lanzi v. Brooks, 43 NY 2d 947); the ninth cause of action (punitive damages) is dismissed without prejudice to plaintiffs showing good ground to support a claim for punitive damages under a fraud cause of action, such showing to be made in the motion directed above; the first cause of action (indemnity) is dismissed without prejudice to its repleader in an amended complaint to be served within 20 days after receipt of a copy of this decision and order; and the motion is denied as to the third (negligence) and fifth (strict liability) causes of action.

Upon receipt by the parties of a copy of this decision and order, the complaint shall be deemed amended to reflect the above disposition.

The foregoing constitute the order of the court.

/s/ [ILLEGIBLE]
J.S.C.

Dated: November 19, 1985

Supreme Court, U.S.
FILED
NOV 14 1994
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No. 94-661

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

W.R. GRACE & CO.-CONN., *Petitioner*,

v.

MARYLAND CASUALTY COMPANY, ROYAL INDEMNITY COMPANY, THE AETNA CASUALTY AND SURETY COMPANY and CONTINENTAL CASUALTY COMPANY, *Respondents*.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether diversity jurisdiction is properly invoked when, under any alignment of the parties to the original complaint, each party is diverse from every other party.

2. Whether this Court should review a court of appeals' application of state law to interpret the unambiguous terms of an insurance contract.

LIST OF PARTIES AND CORPORATIONS

In addition to the parties to the proceedings identified in the Petition for a Writ of Certiorari, Respondent Continental Casualty Company ("CCC") was a party in the courts below.

Pursuant to Rule 29.1, Respondent The Aetna Casualty and Surety Company ("Aetna") states that its parent corporation is Aetna Life and Casualty Company; Aetna has no subsidiaries. Respondent CCC states that its parent corporation is CNA Financial Corporation; CCC states that its only subsidiary that is not wholly owned is Agency Management Services, Inc.

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On Petition for a Writ of Certiorari to the
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BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

In the early 1960's, W.R. Grace & Co.-Conn. ("Grace") began purchasing and operating businesses that were involved in the manufacture and sale of asbestos-containing products. Grace's primary liability insurer at that time was the Maryland Casualty Company ("Maryland"). Maryland continued to be Grace's primary insurer until 1973, when Grace began placing its primary coverage with CCC. In the early 1980's, Grace began to be named as a

defendant in a large number of asbestos-related lawsuits. Without conceding any obligation to do so, Maryland began paying insurance proceeds in connection with some of these claims. So did CCC.

In October 1983, Maryland filed a declaratory judgment action against Grace and CCC in the United States District Court for the Southern District of New York. Maryland sought rulings on whether it, CCC and/or Grace was actually responsible to defend the asbestos-related claims against Grace and to pay ensuing judgments and settlements. Grace did not cross-claim against CCC.

On April 30, 1984, Grace filed its own declaratory judgment action in the Superior Court for the District of Columbia against Royal Indemnity Company ("Royal"), which Grace believed to have insured one of the predecessor businesses that Grace had purchased in the early 1960's. In June 1984, Grace amended its complaint to add as defendants both Aetna and General Insurance Company of America ("General"), insurance companies that Grace believed had insured other predecessor companies. Grace was unable to locate the insurance policies allegedly issued by Royal, Aetna and General, and each denied having issued the alleged insurance policies.

In July 1984, Maryland sought leave to amend its complaint to add Royal, Aetna and General as defendants to its action. When leave was granted, Maryland amended its complaint to seek a declaration that Royal, Aetna and General were each obligated to participate with (or in lieu of) Maryland in the defense and indemnification of the asbestos-related claims against Grace. Grace cross-claimed

against Royal, Aetna and General. All three insurers continued to deny that they had issued the alleged insurance.

In 1991, the district court issued rulings on various cross-motions for summary judgment. On one issue, the trigger of coverage for so-called "property damage" claims against Grace, the trial court issued a Rule 54(b) judgment in favor of Maryland and Royal. Grace appealed to the Second Circuit. On appeal, Grace challenged both the substantive ruling and the district court's subject-matter jurisdiction.

Aetna appeared before the court of appeals to defend the district court's exercise of jurisdiction since, in the absence of jurisdiction, that court's resolution of the claims against Aetna by Maryland, CCC, General and Royal would be undermined.[1] On September 1, 1993, the Second Circuit denied Grace's jurisdictional challenge and reversed and remanded the trial court's substantive ruling.

In September 1993, both Grace and Royal filed timely petitions for rehearing and suggestions for rehearing in banc. In January 1994, the Second Circuit granted rehearing on its substantive ruling, only. Following rebriefing, the Second Circuit reaffirmed its original ruling in a decision issued May 16, 1994. (Pet. App. 3a). As it had on September 1, 1993, the court of appeals remanded to the trial court for "an examination of each underlying

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[1] In early 1992, soon after the appeal was filed, Aetna settled with Grace. Thereafter, Maryland and Aetna entered a settlement, which was contingent on the dismissal with prejudice of the cross-claims of CCC, General and Royal against Aetna. At a contested hearing, the claims of CCC, General and Royal against Aetna were dismissed with prejudice.

[asbestos building] claim to determine when property damage -- the installation of asbestos -- occurred." (Pet. App. 27a).

ARGUMENT

Review of this case in this Court is unwarranted. Although the Petition asserts the existence of a circuit conflict on the issue of jurisdiction, that supposed conflict is not presented by the facts of this case and would not be reached by the Court on review. The Petition's criticism of the Second Circuit's rationale on the substantive issue is an unimportant -- and unjustified -- attack on that court's resolution of a state law dispute.

1. THE SUPPOSED CONFLICT REGARDING THE PROPER TEST FOR ALIGNING PARTIES IN ORDER TO EVALUATE DIVERSITY JURISDICTION IS NOT PRESENTED BY THIS CASE

The Petitioner asserts that this Court should grant certiorari to resolve an asserted conflict among the circuits. The issue presented by the alleged conflict is whether, for jurisdictional purposes, parties must be aligned according to a "collision of interests" or a "primary purpose" test. For two reasons, this case does not present that issue.

a. *Under any alignment of the relevant parties, complete diversity exists.* Three years ago, in *FreePort-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426 (1991), this Court explained that the addition of non-diverse parties to a pending action predicated on diversity jurisdiction will not destroy the federal court's jurisdiction over the action. Specifically, after observing that "[w]e have consistently held

that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events," this Court held that "[d]iversity jurisdiction, once established, is not defeated by the addition of a nondiverse party to the action." 498 U.S. at 428.

As the Petition demonstrates, at the time this action was commenced each party to it was diverse from every other party (Pet. at 4):

> At the time the lawsuit was filed, Maryland Casualty was a Maryland corporation with its principal place of business in Baltimore; Grace was a Connecticut corporation with its principal place of business in New York; [CCC] was incorporated in Illinois, with its principal place of business in Chicago.

Thus, at the time this suit was commenced, diversity jurisdiction was proper no matter how the parties were aligned.

Thereafter, Maryland Casualty sought and received leave to amend its complaint to add three additional parties as defendants: Aetna, Royal, and General. Two of those parties, Aetna and Royal, if aligned as plaintiffs, would not be diverse from Grace. Under *FreePort-McMoRan*, however, the citizenships of Aetna, Royal and General are irrelevant to the existence of diversity jurisdiction.

Because diversity jurisdiction exists under any alignment of the relevant parties, this case does not present the question of whether parties should be realigned in order to test the presence of diversity jurisdiction. The first

question raised by the Petition is simply not an issue that would be before this Court.

b. *The court below held that alignment was proper under any application of City of Indianapolis.* Although the Second Circuit held that realignment of parties to destroy diversity jurisdiction is required only if the "real interests" of the plaintiffs and defendants are not truly adverse (Pet. App. 13a), the court further found, under the facts of this case, that "realignment would be inappropriate even under the primary purpose test" (Pet. App. 15a). In other words, the Second Circuit evaluated the actual disputes among the parties in this case and found that, no matter how *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63 (1941), is applied, realign- ment and dismissal would be inappropriate.

In *City of Indianapolis*, this Court explained that the appropriateness of realignment in any given case "is to be found not in legal learning but in the realities of the record." 314 U.S. at 69. The Second Circuit followed that instruction and performed the intensely fact-specific task of analyzing the actual disputes presented in this case. The Second Circuit found -- correctly -- that the disputes among Maryland and the various insurer-defendants (CCC, Aetna, Royal, and General) were substantial and that Maryland has prosecuted its claims against the insurer-defendants at least as vigorously as has Grace. (*See* Pet. App. 15a-16a). Accordingly, the Second Circuit (i) concluded that the primary purpose of this action -- resolving who, among all of the parties, is liable for certain asbestos-related claims -- pits each party equally against every other party (Pet. App. 15a-16a) and, therefore, (ii) held that there were "substantial

controversies" among the insurers that easily satisfied the "collision of interest" test (Pet. App. 16a-17a).[2]

Because the Second Circuit found that the alignment of the parties in this case is proper under any application of *City of Indianapolis*, any dispute as to how the ruling in that case should be applied to the actual disputes presented by this case is academic and inappropriate for certiorari review.

2. PETITIONER'S CRITICISM OF THE SECOND CIRCUIT'S ANALYSIS IS AN UNJUSTIFIED ATTACK ON THAT COURT'S RESOLUTION OF A STATE LAW DISPUTE

The Petitioner asserts that this Court should grant certiorari to review the Second Circuit's analysis of the meaning of an insurance contract governed by the state law of New York. The Petition acknowledges that the Second Circuit correctly understood and described the scope of its review function (Pet. at 18), but criticizes that court for then violating its role by "couch[ing]" a factual issue as a legal one (Pet. at 19). Even if the Petitioner's criticism was justified -- which it is not -- it does not present an important federal question.

The Second Circuit did not make factual findings. The question before the Second Circuit was "one of contract

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[2] The Petition deems significant that other circuits, faced with different parties and different disputes, aligned all insurers against a policyholder. Because the actual disputes in every coverage action are different, it can be expected that the "realities of the record" will cause courts to align insurers and policyholders differently in different cases. 314 U.S. at 69.

interpretation." (Pet. App. 18a). Specifically, the court was called upon to decide, under principles of New York state law, the meaning of two terms found in the relevant insurance contracts: occurrence and property damage. In a portion of the opinion not criticized by Petitioner, the court concluded that New York state courts would interpret the concept of an "occurrence," as used in the insurance policies, to require "damage-in-fact" during the policy period. The Second Circuit reached this conclusion upon analyzing the language of the pertinent insurance policy provision (Pet. App. 20a) and then considering state law cases applying that policy language (*id.*).

The court of appeals followed precisely the same analysis in concluding that New York state courts would interpret the concept of "property damage," as used in the insurance policies, to include the incorporation of asbestos-containing materials in a building (*i.e.*, installation), but not any effects of asbestos-containing materials following their installation. The Second Circuit reached this conclusion upon analyzing the language of the pertinent insurance policy provision (Pet. App. 23a) and then considering state law cases applying that policy language (Pet. App. 24a-26a). The Second Circuit then remanded to allow Grace to prove when, in each case for which Grace is held liable, property damage -- as that term is used in the insurance policies -- occurred. (Pet. App. 27a-28a). The court made no improper factual finding.[3]

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[3] Petitioner argues to this Court, as it argued to the court of appeals, that it should be entitled to a remand to prove that asbestos is released in building atmospheres after installation. (Pet. at 22, 24). The Second Circuit did not remand this action to allow the Petitioner to prove that contention *because the court of appeals had already assumed, for purposes of its decision, the contention to be true.* (Pet. App. 26a). Even so, the court of appeals held, the release and re-entrainment of

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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asbestos fibers does not cause property damage, as that term is used in the insurance policies. (*Id.*).

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENT MARYLAND CASUALTY COMPANY'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. May this Court entertain a petition for a writ of certiorari when the petition was filed two months out of time?

2. Should certiorari be granted based on a purported need to realign the parties when all parties to this action are aligned correctly under any judicially-recognized approach to proper alignment?

3. Should this Court grant certiorari to review a challenge to the application of state law to a dispute regarding insurance coverage for asbestos-in-buildings claims?

STATEMENT PURSUANT TO RULE 29.1

Respondent Maryland Casualty Company is a corporation organized under the laws of Maryland and is a wholly-owned subsidiary of Zurich Insurance Company.

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RESPONDENT MARYLAND CASUALTY COMPANY'S BRIEF IN OPPOSITION

Respondent Maryland Casualty Company ("Maryland") respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the judgment and opinion of the United States Court of Appeals for the Second Circuit.

JURISDICTION

Pursuant to 28 U.S.C. § 2101 and Rule 13.4 of the Rules of the Supreme Court, this Court is without jurisdiction to entertain this petition because it was filed approximately five months after entry of the Second Circuit's amended judgment on rehearing.

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are involved: 28 U.S.C. § 1332; 28 U.S.C. § 2101(c); Supreme Court Rule 13.4. Petitioner has reproduced 28 U.S.C. § 1332 at page 2 of its Petition. The entire text of 28 U.S.C. § 2101(c) and Supreme Court Rule 13.4 is reproduced in the Appendix attached hereto. (R. App. 1a.)[1]

COUNTERSTATEMENT OF THE CASE

A. Nature Of The Case

On October 11, 1983, Maryland commenced this action against its insured, Petitioner W.R. Grace & Co.-Conn. ("Grace") and the Continental Casualty Company ("CNA"), Grace's subsequent primary insurer. In an action governed by New York law, Maryland sought a judicial allocation of responsibility among Maryland, Grace and CNA for thousands of asbestos-related bodily injury claims filed against Grace. Maryland had been sharing defense costs for such claims equally with CNA. Maryland also sought a declaration that it owed nothing to Grace and CNA for asbestos-in-buildings cases filed against Grace. CNA had been defending such cases but Maryland had not.

In 1984, Maryland learned of primary liability insurance that had been issued to companies that had manufactured and distributed asbestos-containing materials and were subsequently acquired by Grace. Royal Indemnity Company ("Royal"), the General Insurance Company of America ("General"), and Aetna Casualty & Surety Company ("Aetna") were the insurers of those acquired companies. Those insurers all refused to defend or indemnify asbestos claims.

Maryland amended its complaint to add those insurers as defendants. Maryland sought to compel them to share

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[1] R. App. refers to the attached appendix of Respondent Maryland Casualty Company.

with it the responsibility for asbestos-related bodily injury claims against Grace. Specifically, Maryland sought reimbursement for a portion of its payments from Royal, General, and Aetna, which had paid nothing.

This action did not pit the insurers as a group against their insured. Grace and CNA have never been adverse. (P. App. 15a.)[2] Grace and each defendant insurer filed counterclaims against Maryland. Maryland vigorously disputed its rights and obligations to Grace[3] and each defendant insurer. Although Maryland and CNA had both paid large sums for Grace's defense costs, they disagreed about their relative obligations. CNA asserted a $60 million claim against Maryland to be "indemnified for money it paid to Grace."[4] (P. App. 15a.) Aetna, Royal and General each asserted counterclaims and denied any obligation to Maryland.

Maryland moved for partial summary judgment against Aetna, General and Royal in 1987. Maryland continued to pursue its claims against Aetna, General and Royal during the pendency of this appeal, which was made pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. In 1992, Maryland took its claim against Aetna to trial; the dispute settled only after the jury was impanelled. Together with CNA and Grace, Maryland took a portion of its case against Royal to trial in April of this year. That trial settled before a jury verdict was rendered but the balance of Maryland, CNA and Grace's claims against Royal remain pending today in the district court. In April and May of this year, Maryland and CNA took to trial a portion of their claims against General. No verdict has yet been rendered in that bench trial.

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[2] P. App. refers to the Appendix filed by the Petitioner.

[3] Maryland and Grace settled their dispute in 1991. Grace has subsequently settled its disputes with CNA, Aetna and General.

[4] Maryland and CNA settled in 1993.

B. Proceedings And Disposition Below

1. The District Court

Maryland filed this action against Grace and CNA based on diversity jurisdiction pursuant to 28 U.S.C. § 1332(a). Maryland sought to amend its complaint in 1984 to include Royal, General and Aetna. Grace opposed Maryland's motion on the ground that the additional defendants would destroy diversity jurisdiction.[5] On April 23, 1985, the district court granted Maryland leave to amend its complaint to include Royal, General, and Aetna. Until this appeal was before the Second Circuit more than five years later, Grace never moved to realign the parties.

In 1986, this case was assigned for all purposes to United States Magistrate Judge Leonard A. Bernikow, pursuant to 28 U.S.C. § 636(c), with the consent of the parties. On cross-motions for partial summary judgment, the district court held, on March 1, 1991, *inter alia*, that the "date of discovery" trigger governs coverage for asbestos-in-buildings claims under Maryland's policies.[6] (P. App. 64a.) The court also held that discovery took place after Maryland's policies expired, and therefore that Maryland had no obligation for the asbestos-in-build-

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[5] Grace's opposition to Maryland's proposed joinder was unsurprising—Grace has attempted to derail this declaratory judgment action nine times by filing duplicative actions in other courts. Several of those courts have dismissed Grace's competing actions. *See, e.g., W.R. Grace & Co. v. Hartford Accident & Indem. Co.*, 407 Mass. 572, 555 N.E.2d 214 (1990); *W.R. Grace & Co. v. Home Ins. Co.*, No. 89-7976, slip op. at 7-9 (Minn. Dist. Ct., Hennepin County Nov. 3, 1989); *W.R. Grace & Co.-Conn. v. Admiral Ins. Co.*, No. 91-048251 (Tex. Dist. Ct., Harris County Feb. 7, 1992), *appeal dismissed*, No. B14-92-00965-CV (Tex. Ct. App. Apr. 29, 1993).

[6] Other issues decided on partial summary judgment, including issues that may eliminate or limit a duty to defend or indemnify all or many of the asbestos-in-buildings cases, are not before this Court on this appeal from the Rule 54(b) judgment.

ings claims against Grace. (P. App. 64a.) The district court adhered to its decision in reconsideration orders dated July 8, 1991 and October 22, 1991.

Based on these decisions, Maryland moved for entry of final judgment pursuant to Fed. R. Civ. P. 54(b). Royal independently moved for a Rule 54(b) judgment, seeking to benefit from the rulings in Maryland's favor. Separate orders granting Maryland's and Royal's Rule 54(b) motions are virtually identical. (P. App. 10a.)

2. *The Court of Appeals*

Grace noticed its appeal of the Rule 54(b) judgment in favor of Royal on December 20, 1991.[7] While the appeal was pending, Grace moved the United States Court of Appeals for the Second Circuit to vacate the district court's decision for lack of subject matter jurisdiction on the ground that the insurer defendants should be realigned as plaintiffs. A ruling on Grace's motion was referred to the Second Circuit panel that would address the merits.

On September 1, 1993, the Second Circuit, adhering to this Court's decision in *City of Indianapolis v. Chase National Bank*, 314 U.S. 63 (1941), found that the parties were aligned properly and upheld subject matter jurisdiction.[8] After a thorough analysis of the facts of this case, the court observed that:

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[7] Grace and Maryland stipulated to the dismissal of the appeal (91-9386) from the Rule 54(b) judgment entered in favor of Maryland. Maryland is a party here because this appeal challenges the March 1, 1991, July 8, 1991 and October 22, 1991 non-final orders entered in Maryland's favor. Because its rights are directly at stake in this appeal, Maryland moved the Second Circuit on March 5, 1992 to confirm its status as a party-appellee. The motion was granted on March 12, 1992.

[8] *Maryland Casualty Co. v. W.R. Grace & Co.*, No. 91-9322 (2d Cir. Sept. 1, 1993).

> In its effort to defeat diversity jurisdiction, Grace insists that the insurers are united in their efforts to deny Grace coverage. It states that inter-insurer disputes concerning contribution and indemnity are collateral because they will exist only to the extent that insurance coverage is established. This characterization of the facts we think ignores the practical reality of the litigation. Because the insurers are of a single mind to escape liability for paying claims does not mean that they are not in conflict with one another. In fact, the disputes among the insurers have been significant from the start of the lawsuit and produced the required collision of interests to sustain diversity.

(P. App. 15a.)

In reaching its decision, the Second Circuit found that "actual and substantial controversies exist among the insurers and Grace." (P. App. 16a-17a.) The court held both that realignment was not required under the "collision of interests" test *and* that "realignment would be inappropriate even under the primary purpose test" advocated by Grace. (P. App. 15a.) Accordingly, the court held that there was no possibility of a jurisdictional defect due to misalignment of the parties on the facts of this case.

On the merits, the Second Circuit reversed Magistrate Judge Bernikow's finding that the "date of discovery" trigger governs coverage for asbestos-in-buildings claims under Maryland's and Royal's policies. It also rejected Grace's theory of continuous injury, holding that property damage from asbestos-in-buildings is not "ongoing" beyond the time of installation. (P. App. 26a-27a.) Instead, it found that, under New York law, insurance coverage for asbestos-in-building claims is triggered by "injury-in-fact" which occurred at the time when Grace's asbestos-containing product was installed in buildings.

3. *The Rehearing Petitions*

On September 29, 1993, Grace and Royal filed separate petitions for rehearing, suggestions for rehearing *in banc*, and motions for certification to the New York Court of Appeals. (R. App. 2a-3a.) Grace was supported by numerous *amici*. The central theme of Grace and the *amici* in support of rehearing was that the court had made an improper "finding of fact" when it made its trigger of coverage ruling. Grace also asked for rehearing on the realignment issue.

The Second Circuit panel granted rehearing on the trigger of coverage issue on January 11, 1994. It denied rehearing on the realignment issue and did not certify a question to the New York Court of Appeals. (P. App. 88a-89a.)

On May 16, 1994, the Second Circuit issued its amended judgment. The court's amended judgment—as recognized by Grace—was "essentially the same as the September 1993 decision, with some non-substantive editing." Grace Petition at 9. The amended judgment was entered on May 16, 1994, and filed on May 19, 1994.

No order as to *in banc* consideration was issued when the amended judgment was entered. (P. App. 1a-2a.) On June 13, 1994, Grace submitted a second "Petition for Rehearing *en banc*." (R. App. 4a-5a.) On June 22, 1994, the Second Circuit denied Grace's original suggestion for rehearing *in banc*. Grace's second request for *in banc* review was denied on July 15, 1994. The Second Circuit's mandate was issued on July 22, 1994.

Grace filed its petition for a writ of certiorari with this Court on October 13, 1994.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE PETITION IS UNTIMELY BECAUSE IT WAS FILED FIVE MONTHS AFTER THE SECOND CIRCUIT ENTERED ITS AMENDED JUDGMENT

Rule 13.4 of this Court states that:

> The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and *not from the date of the issuance of the mandate* . . . . However, if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties . . . runs from the date of the denial of the petition for rehearing or *the entry of a subsequent judgment. A suggestion made to a United States court of appeals for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule.*

Sup. Ct. R. 13.4 (emphasis added); *see also* 28 U.S.C. § 2101(c) (1988); *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990) ("the period in which a petition for certiorari must be sought [is tolled only] until . . . a new judgment is entered on rehearing").

The panel of the Second Circuit deciding this case granted rehearing on January 11, 1994, and entered its "new" and "subsequent" judgment on May 16, 1994. Accordingly, Grace's petition for a writ of certiorari was due ninety days later—on August 15, 1994. Because the petition was not filed until October 13, 1994—almost two months out-of-time—it must be dismissed for lack of jurisdiction.

This Court has repeatedly recognized that the time limitations prescribed by Congress in 28 U.S.C. § 2101(c) with respect to civil cases are "mandatory and jurisdictional." *Jenkins*, 495 U.S. at 45; *accord Matton Steamboat Co. v. Murphy*, 319 U.S. 412, 415 (1943); *De-*

partment of Banking v. Pink, 317 U.S. 264, 268 (1942); *Boylan v. United States*, 257 U.S. 614, 614 (1921); *Citizens Bank v. Opperman*, 249 U.S. 448, 450-51 (1919); *see also* Robert L. Stern et al., *Supreme Court Practice* § 6.1(d), at 278 (7th ed 1993). There is no exception to this Rule for civil cases, and an untimely petition cannot be considered regardless of the circumstances. *Deal v. Cincinnati Bd. of Educ.*, 402 U.S. 962 (1974) (airline lost all the papers and caused the petition to be filed on the next working day); *Teague v. Regional Comm'r of Customs*, 394 U.S. 977 (1969) (an unusually severe snowstorm caused the petition to arrive two days late).

To be sure, Grace filed a further pleading in the Second Circuit on June 13. However, that pleading plainly did not toll the running of the ninety day limit under Rule 13.4. The caption of that pleading and its contents explicitly stated that it sought only "rehearing *en banc*" under Rule 35(b) of the Federal Rules of Appellate Procedure. (R. App. 4a-5a.) Rule 13.4 provides that seeking rehearing *in banc* under Rule 35(b) does *not* extend the time for seeking certiorari.

Grace should not now be heard to contend that its June 13 filing in the Second Circuit was something other than a Rule 35(b) request, *i.e.*, a second request for rehearing by the panel. Neither the Federal Rules of Appellate Procedure nor the local rules of the Second Circuit allow a petitioner to file successive petitions for rehearing.[9] Grace's June 13 pleading was plainly—and necessarily—directed to the full Second Circuit bench and sought only *in banc* consideration. It was not addressed

[9] *See, e.g., National Latex Prods. Co. v. Sun Rubber Co.*, 276 F.2d 167, 168 (6th Cir. 1960) ("Neither the applicable statute nor the rules of this Court authorize a second or successive petitions for rehearing."); *Magidson v. Duggan*, 219 F.2d 946, 947 (8th Cir. 1955) (same); *F.H.E. Oil Co. v. Commissioner*, 150 F.2d 857, 858 (5th Cir. 1945) (same); *City of Stuart v. Green*, 91 F.2d 603, 606 (5th Cir. 1937) (same).

to the panel that had just ruled on rehearing.[10] Under Rule 13.4 of this Court, that filing does not save Grace from its tardiness in petitioning for certiorari.[11]

Accordingly, Grace petitioned for certiorari out of time. This Court does not have jurisdiction to entertain its petition.

II. THE ALIGNMENT OF PARTIES IN THIS CASE WAS PLAINLY PROPER AND ANY DIVERGENCE IN APPROACH TO ALIGNMENT AMONG LOWER COURTS IS NOT IMPLICATED HERE

Grace argues that the parties need to be realigned so as to destroy diversity and deprive the federal court of jurisdiction. After eleven years of hard-fought litigation, Grace asks this Court to reject the assessment of the lower courts and impose Grace's wholly artificial characterization of which parties are supposedly most at odds with each other. On that essentially factual basis, Grace would

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[10] Although Grace's submission was styled as a "Petition for Rehearing *en banc*," it was clearly a mislabeled "Suggestion for Rehearing *in banc*." A review of the contents of the document reveals that it was directed only to the full Second Circuit bench—not the panel. (R. App. 4a-5a.) Nowhere does the document request or suggest that the Second Circuit panel rehear what it had just finished reconsidering. Indeed, in the following weeks, counsel for Grace represented to the district court and the Second Circuit that Grace sought only *in banc* rehearing. *Maryland Casualty Co. v. W.R. Grace & Co.*, No. 88 Civ. 2613 (SWK), tr. at 3-4, 6 (S.D.N.Y. June 6, 1994) ("[W]e, being Grace, have moved for *rehearing en banc*. . . . We hope . . . that your Honor would wait, as you did last September, until the Second Circuit, *as a full circuit*, decides Grace's petition . . . ." (statement of Philip G. Barber, counsel for Grace) (emphasis added)) (R. App. 6a-10a); Letter from Anthony J. Marchetta, Counsel for Grace, to Olivia George, Office of the Clerk, U.S. Court of Appeals for the Second Circuit (June 28, 1994) ("Grace's present petition for *rehearing en banc* is still before the Court for consideration." (emphasis added)) (R. App. 11a).

[11] A ruling that the petition is untimely would not be inconsistent with this Court's decision in *Missouri v. Jenkins*, 495 U.S. 33 (1990), because in that case the Petitioner had mislabeled its *original* rehearing petition to the Court of Appeals as a petition for rehearing *in banc*.

have this Court relieve Grace of a judgment that it does not like.

Grace dresses up its factual argument as one involving a supposed conflict between the circuits in interpreting this Court's holding in *City of Indianapolis v. Chase National Bank*, 314 U.S. 63 (1941). As the Second Circuit noted, however, under *any* interpretation of *Indianapolis*, the alignment of the parties *in this case* is correct. (P. App. 15a.) Accordingly, even if Grace's petition were timely, this case would be unworthy of certiorari and the petition would properly be denied.

The Second Circuit's decision recognized that, under *Indianapolis*, realignment is "a fact-specific inquiry" requiring an examination of the "realities of the record" to discover the parties' "real interests." (P. App. 14a) (quoting *Indianapolis*, 314 U.S. at 69). The court then analyzed the actual conflicts between the parties in this case, and found that there were real and substantial conflicts between Maryland and Grace's other insurers. The "realities of the record" disclosed that Maryland was as adverse to Grace's other insurers as it was to Grace. As described by the court, "with millions of dollars at stake, which of them must pay or how far back coverage would extend inevitably pitted each insurer against all the others." (P. App. 16a.)

Finding that Grace's "characterization of the facts . . . ignores the practical reality of the litigation," the Second Circuit held that:

> Maryland's amended complaint suggests adversity among the insurers with the allegation that its liability "is directly affected by the interpretation of the rights and duties of Grace (or its predecessor companies) and each of the defendant insurers under their respective contracts of insurance." Disunity among the insurers is established further because Continental [CNA], Grace's current insurer, *never* has been adverse to Grace and, in fact, is actively

> pursuing a $60 million counterclaim against Maryland to be indemnified for money it paid to Grace. Continental, in addition, has filed cross-claims against Royal, Aetna and General.

(P. App. 15a) (emphasis in original).

In reaching its conclusion, the Second Circuit held that under the "collision of interests" test articulated in *Indianapolis*, actual and substantial controversies existed among the insurers and therefore realignment of the parties was improper. (P. App. 16a-17a.)

Further, the Second Circuit said that "realignment would be inappropriate even under the primary purpose test" advocated by Grace. (P. App. 15a.) Indeed, "the insurers were at all times adverse." (P. App. 16a.)[12]

The reality is that Maryland has litigated aggressively against CNA, General, Aetna and Royal. Indeed, all three of the trials held in this case have pitted Maryland against another insurer. Similarly, CNA has been litigating actively against General and Royal. According to the view that Grace advocates, all of those antagonists are to be seen as constructive co-plaintiffs whose massively litigated disputes are to be judicially transformed into mere subordinate cross-claims. The only parties in this case that have never been adverse to one another are Grace, which sees itself as the sole proper defendant, and CNA, which Grace asserts must somehow be a plaintiff.

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[12] The Second Circuit observed that under *Indianapolis*, the "collision of interests" test is the proper test for determining the suitability of realignment. (P. App. 13a.) The court did not employ the "primary purpose" test, reasoning that such an "approach is not actually dictated by *Indianapolis* because though the facts of that case involve only a single controversy among the litigants involving the enforceability of a 99-year lease, the Supreme Court did not intend that all cases be forced into a single issue posture." (P. App. 14a.) However, this analysis was not necessary to the Second Circuit's holding. In fact, the Second Circuit itself emphasized that Grace's position was without merit under either approach.

Grace's bizarre reshuffling of parties and their interests and claims is transparently calculated to evade an adverse judgment below. As the Second Circuit recognized, this case is clear-cut. This case does not implicate any divergence among circuits about how to approach realignment of parties in harder cases.

The two principal cases relied upon by Grace apply a "primary purpose" analysis that differs somewhat from the Second Circuit's approach. However, they do not reflect a split in the circuits as to the outcome in a case such as this one. In *Employers Insurance of Wausau v. Crown Cork & Seal Co.*, 942 F.2d 862 (3d Cir. 1991), the Third Circuit upheld realignment of the insurer parties because "[t]heir common adversity to [the policyholder] is evident. There is no insurer who is not antagonistic to [the policyholder]." *Id.* at 866. Further, that court found that "the disagreements among the insurers who are presently grouped together as defendants are not so great." *Id.* Here, of course, the only parties that have never been adverse are the policyholder and an insurer (CNA). In this case, it is the "disagreements" among insurers that are fundamental. Thus, far from adopting a conflicting rule, the Third Circuit, like the Second, plainly would have had no difficulty with the alignment of the parties in this case.

Similarly, in *United States Fidelity & Guaranty Co. v. Thomas Solvent Co.*, 955 F.2d 1085 (6th Cir. 1992), "*all* of the insurance companies opposed [the policyholders]." *Id.* at 1091 (emphasis added). This characterization would not fit here. Thus, the Sixth Circuit would not have reached a result different from that of the Second Circuit on the alignment of parties in this case.

At bottom, Grace asks this Court to adopt a simplistic, wooden rule for aligning parties in an insurance coverage dispute. Under Grace's rule, the policyholder would automatically be deemed to be on one side and all of the in-

surers, regardless of their interests or positions, would be lumped on the other. That mechanistic approach finds no support in any of the cases.

If there is a need for this Court to sort out the supposedly disparate approaches of various lower courts to the "fact-specific" determination of whether parties are properly aligned for purposes of diversity jurisdiction, this case would be an odd vehicle for that task. Here, the recharacterization of the parties' positions offered by Grace is utterly at odds with reality. Further, any theoretical variations in the circuits' approaches to alignment would not produce a different outcome here. Accordingly, certiorari should not be granted.

III. THE DECISION REGARDING TRIGGER OF COVERAGE UNDER NEW YORK COMMON LAW PRESENTS NO ISSUE OF FEDERAL LAW

In recent years, numerous litigants have sought review by this Court of state common law insurance coverage cases. The Court has uniformly denied certiorari.[13]

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[13] *See, e.g., Tonka Corp. v. Bituminous Casualty Corp.*, 9 F.3d 51 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1834 (1994); *Hartford Accident & Indem. Co. v. United States Fidelity & Guar. Co.*, 962 F.2d 1484 (10th Cir.), *cert. denied*, 113 S. Ct. 411 (1992); *Broderick Inv. Co. v. Hartford Accident & Indem. Co.*, 954 F.2d 601 (10th Cir.), *cert. denied*, 113 S. Ct. 189 (1992); *Lumbermens Mut. Casualty Co. v. Belleville Indus., Inc.*, 938 F.2d 1423 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 969 (1992); *FL Aerospace v. Aetna Casualty & Sur. Co.*, 897 F.2d 214 (6th Cir.), *cert. denied*, 498 U.S. 911 (1990); *Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977 (8th Cir.), *cert. denied*, 488 U.S. 821 (1988); *Maryland Casualty Co. v. Armco Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988); *Borden, Inc. v. Affiliated Ins. Co.*, 682 F. Supp. 927 (S.D. Ohio 1987), *aff'd*, 865 F.2d 1267 (6th Cir.), *cert. denied*, 493 U.S. 817 (1989); *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982); *Insurance Co. of N. Am. v. Forty-Eight Insulations*, 633 F.2d 1212 (6th Cir. 1980), *cert. denied*, 454 U.S. 1109 (1981); *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.*, 64 Ohio St. 3d 657, 597 N.E.2d 1096 (1992), *cert. denied*, 113 S. Ct. 1585 (1993).

Grace is the latest litigant to ask the Court under the guise of a procedural irregularity to examine a substantive state law determination.

On the merits, the Second Circuit in this case dealt under New York law with a frequently litigated issue of insurance policy interpretation concerning losses in which actions taken in an earlier era allegedly cause harm that only becomes apparent many years later. On appeal from summary judgment below, the Second Circuit decided which of the insurance policies issued from the time when the causative acts began through the resolution of the resulting harm potentially respond to the tort claim. Addressing property damage claims, it built upon an earlier decision, *American Home Products, Inc. v. Liberty Mutual Insurance Co.*, 748 F.2d 760 (2d Cir. 1984), which had predicted how the New York courts would resolve those issues in the context of bodily injury claims.[14] Adhering to the same "injury in fact" standard articulated in *American Home Products*, the Second Circuit ruled that as a matter of law, "actual injury to property—the presence of the asbestos hazard—occurs upon installation and exists regardless of whether it yet has been discovered by the building owners." (P. App. 25a.)

Grace asks this Court to review that determination, which it contends somehow involved "impermissible appellate fact-finding" under Rule 56 of the Federal Rules of Civil Procedure. Grace Petition at 16. The proper interpretation of an insurance policy is, of course, a question of law to be determined by the court.[15]

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[14] *American Home Products* was ultimately adopted as New York law by *Continental Casualty Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 651, 609 N.E.2d 506, 511, 543 N.Y.S.2d 966, 971 (1993).

[15] *See, e.g., Christiana Gen. Ins. Corp. v. Great American Ins. Co.*, 979 F.2d 268, 274 (2d Cir. 1992); *Caporino v. Travelers Ins. Co.*, 62 N.Y.2d 234, 238, 465 N.E.2d 26, 28, 476 N.Y.S.2d 519, 521 (1984); *see also Anetsberger v. Metropolitan Life Ins. Co.*, 14 F.3d

In this case, the Second Circuit made precisely such a legal determination. Grace is simply incorrect in asserting that the Second Circuit resolved factual disputes against it on summary judgment. To the contrary, the Second Circuit assumed *arguendo* the factual predicate that Grace alleges it never had an opportunity to prove. Specifically, it assumed that asbestos fibers are constantly released and reentrained in buildings. It held as a matter of law that the release and reentrainment of asbestos fibers does not constitute additional insured "property damage." Thus, the court explained:

> Next, it must be decided whether the injury to property continues after the discrete event of asbestos installation. . . . Once installed, the damage the asbestos inflicts is complete. The underlying plaintiffs contend that asbestos fibers are constantly released and reentrained into a building's atmosphere, creating further property damage. *If such deterioration in fact exists,* its damaging effect concerns solely the health of those persons who breathe the contaminated air. No further property damage occurs . . . .

(P. App. 26a) (emphasis added).

Thus, far from rejecting Grace's factual contentions on an impermissible basis, the Second Circuit held that, even if true, Grace's factual thesis would be insufficient as a matter of law to sustain Grace's interpretation of its insurance contract. This is, of course, precisely the kind of analysis this Court has urged the lower courts to conduct under Rule 56 of the Federal Rules of Civil Procedure. *See, e.g., Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-49 (1986).

1226, 1231 (7th Cir. 1994); *Bird v. Centennial Ins. Co.,* 11 F.3d 228, 232 (1st Cir. 1993); *Langley v. Allstate Ins. Co.,* 995 F.2d 841, 844 (8th Cir. 1993).

Grace's contention that the Second Circuit's decision "fail[s] to consider the evidence developed by the plaintiffs in the underlying tort cases against Grace and the nature of the asbestos-related liability imposed on Grace in those cases" (Grace Petition at 23) ignores the Second Circuit's analysis, which assumes the truth of the allegations in the underlying cases regarding the nature of the underlying liability (*i.e.*, the release and reentrainment of asbestos fibers) and nonetheless finds that those events do not trigger additional coverage.

Grace cannot point to any failure of procedure in the lower courts. Its efforts to do so simply seek to involve this Court in questions of state law.

CONCLUSION

For all of the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

RELEVANT STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2101(c) (1988):

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Supreme Court Rule 13.4:

> The time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment. A suggestion made to a United States court of appeals for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule.

91-9322

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARYLAND CASUALTY COMPANY,
Plaintiff-Appellee,

v.

W.R. GRACE AND COMPANY,
Defendant-Appellant,

CONTINENTAL CASUALTY COMPANY;
AETNA CASUALTY & SURETY COMPANY and
GENERAL INSURANCE COMPANY OF AMERICA,
Defendants,

ROYAL INDEMNITY COMPANY;
AETNA CASUALTY AND SURETY COMPANY,
Defendants-Appellees.

PETITION FOR REHEARING, SUGGESTION FOR REHEARING *EN BANC*, AND MOTION FOR CERTIFICATION TO THE NEW YORK COURT OF APPEALS

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91-9322

UNITED STATES COURT OF APPEALS
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MARYLAND CASUALTY COMPANY,
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W.R. GRACE AND COMPANY,
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Defendants-Appellees.

W.R. GRACE AND COMPANY'S PETITION FOR REHEARING *EN BANC*

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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88 Civ. 2613 (SWK)

THE MARYLAND CASUALTY COMPANY,
Plaintiff,

v.

W.R. GRACE & CO.-CONN. *et al.*,
Defendants.

New York, N.Y.
June 6, 1994
11:00 a.m.

Before:

HON. LEONARD BERNIKOW,

United States Magistrate Judge

APPEARANCES

WILEY REIN & FIELDING
Attorneys for plaintiff Maryland Casualty
By: JOHN P. GROARKE

ANDERSON KILL OLICK & OSHINSKY
Attorneys for defendant W.R. Grace & Co.-Conn.
By: PHILIP G. BARBER

MENDES & MOUNT
Attorneys for London Market Insurers
By: EUGENE P. MURPHY

FORD MARRIN ESPOSITO WITMEYER & GLESER
Attorneys for Continental Casualty Company
By: CUSHING O. CONDON

STANDARD WEISBERG
Attorneys for Admiral, Gerling and
and Allstate/Northbrook
By: SUSAN DUNCAN

BOWER & GARDNER
Attorneys for London Guarantee &
Accident Company
By: SIDNEY ROSEN

HOGAN & HARTSON
Attorneys for Hartford Accident & Indemnity Co.
and First State Insurance Co.
By: KEVIN GALLAGHER

MILLER CASSIDY LARROCA & LEWIN
Attorneys for Aetna Casualty & Surety Company
By: JAY ALEXANDER

RIVKIN RADLER & KREMER
Attorneys for Fireman's Fund
By: ALYSE WALKER

BIVONA & COHEN
Attorneys for AIG Member Companies
By: STACEY FABRIZIO

* * * *

[3] THE COURT: I guess the first thing we might discuss is the time in which Grace should respond to the CNA motion for partial summary judgment.

What is your position on that, Mr. Barber?

MR. BARBER: As you may be well aware, in the tortuous roller coaster of this appeal, the Second Circuit initially rendered a decision in September of last year, and then Grace petitioned for rehearing. And the Court indicated that it was interested in hearing whether remand was possible. Nobody objected to that.

Then in January the Second Circuit did grant rehearing and asked for further rebriefing. There was a very elaborate reproving. Grace filed a brief. There was oppo-

sition brief on rehearing. There were a number of amicus briefs put in.

And as you may also note, on May 16 of this year, the Second Circuit issued exactly the same opinion they issued nine months earlier.

Because of that history and because of the particular nature of the Second Circuit's decision regarding the issue of appellate fact-finding, we, being Grace, have moved for rehearing en banc. We filed on last Tuesday. We hope you did get a copy.

We hope, because of the long history and the tortuous rehearing and the many issues involved, that your [4] Honor would wait, as you did last September, until the Second Circuit, as a full circuit, decides Grace's petition before your Honor even takes up whether or not you are to apply Second Circuit's trigger.

THE COURT: What is the usual time frame for them to determine whether to grant en banc consideration?

MR. BARBER: It is hard to say. Usually, the en banc would be at the same time which we did last September. And if the panel does not grant rehearing, as it did in this case, the entire circuit never considers the issue and never tells you whether they grant or deny it because it has been taken up by the same panel. This is an unusual situation where we have had a rehearing, and we are moving for a second hearing en banc, based on the unusual nature.

THE COURT: You may recall I indicated at that time that it was unlikely that you would get—

MR. BARBER: Yes. I recall some talk of the dim light at the end. It was unusual to grant rehearing and, granted rehearing, and go through three or four months of briefing and have the same decision issued almost verbatim—that's why we think there is more than the usual dim light, because there are a lot of issues. Not only are there triggers of coverage issues, but this procedural issue of due process as well the jurisdictional issue which is still pending—and these are issues of large import among

[5] the Circuit and issues the Second Circuit is interested in. The issue of trigger—

THE COURT: What do you mean by "procedural issue of due process"?

MR. BARBER: Your Honor, the issue is that the Second Circuit wasn't allowed—

THE COURT: It was a factual finding?

MR. BARBER: Not only was it not in contradiction of the record, but there was no record developed because the initial decision didn't go up on the issue of installation trigger; it goes up on the issue of when discovery occurred. So there is no record, and we believe that it should be remanded to your Honor for determination of the facts.

MR. CONDON: Your Honor, Cushing Condon, for Continental Casualty.

The Second Circuit has made its decision. How it has come down is quite clear. There is no need for any further delay. Your Honor ruled that, when they did come down the second time, that Grace would have, I believe, two weeks to put in their opposition papers. That two weeks has come and gone, and I think we should move forward.

THE COURT: Let me ask you this, Mr. Condon. Do you have any idea how long it would take the Second Circuit to grant en banc consideration?

MR. CONDON: I have no idea, but I assume, when [6] they will, they will deny it.

THE COURT: I assume they will deny it. They grant very few en banc applications, even less than they grant hearing.

MR. BARBER: That is true, but we do have the unusual scenario here. We filed a short 15-page brief which, oddly enough, the Second Circuit calls us, "We already have a petition for en banc. Why is there a second?" They still had circulating the one from September. We had to explain to them, it is another one, and they have all the issues before them.

And I don't think it would take them very long to decide whether they want to go through the unusual step of hearing this among all the judges.

THE COURT: What is the state of the appeal in the Stonewall case?

MR. BARBER: There may be people in this case that know better than I know. That appeal has been decided, I know the appeal decision came down two years ago.

THE COURT: In this case here, in the Stonewall case?

MR. CONDON: I'm not really familiar with it.

MR. BARBER: Anyway, the decision was two years ago. I have to believe, even with the briefing, it had been before the Second Circuit for quite awhile. Then, your

* * * *

PITNEY, HARDIN, KIPP & SZUCH

Morristown, New Jersey 07962-1945

June 28, 1994

Ms. Olivia George
Office of the Clerk
U.S. Court of Appeals
for the Second Circuit
40 Centre Street
Foley Square, Room 1702
New York, New York 10001

Re: Maryland Casualty Co. v. W.R. Grace
Docket No. 91-9322

Dear Ms. George:

We represent W.R. Grace in the above-referenced matter. This will confirm our telephone conversation on Thursday, June 23, 1994, during which you explained to me that a document dated June 21, 1994 and issued by your office is an administrative pleading designed to close the file on Grace's earlier petition for rehearing *en banc*, dated September 29, 1993. Grace's present petition for rehearing *en banc* is still before the Court for consideration.

Sincerely,

ANTHONY J. MARCHETTA

ALM:mo

cc: See Attached Service List

No. 94-661

Supreme Court, U.S.
FILED
NOV 22 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

W.R. GRACE & CO.-CONN.,

Petitioner,

—v.—

MARYLAND CASUALTY COMPANY, ROYAL INDEMNITY COMPANY, AETNA CASUALTY and SURETY COMPANY and CONTINENTAL CASUALTY COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

ANTHONY J. MARCHETTA
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ELIZABETH J. SHER
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Other Authorities

Robert L. Stern *et al.*, *Supreme Court Practice* § 6.3 (7th ed. 1993) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-661

W.R. GRACE & CO.-CONN.,

Petitioner,

—v.—

MARYLAND CASUALTY COMPANY, ROYAL INDEMNITY COMPANY, AETNA CASUALTY and SURETY COMPANY and CONTINENTAL CASUALTY COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

W.R. Grace & Co.-Conn. ("Grace") files this reply brief pursuant to Rule 15.6 of this Court to address a jurisdictional argument first raised in the brief in opposition filed by respondent Maryland Casualty Company ("Maryland"). Maryland argues that Grace's petition for certiorari, which was filed with this Court on October 13, 1994, was filed out-of-time. In so doing, Maryland has mischaracterized the procedural history and the import of the two rehearing petitions that Grace filed with the Second Circuit.

PROCEEDINGS AND DISPOSITION BELOW

No dispute exists as to the following facts.[1] On September 1, 1993, the Second Circuit issued its initial decision. (Resp. Br. at 5). On September 29, 1993, Grace filed a petition for rehearing and suggestion for rehearing en banc. (Resp. Br. at 7; Resp. App. 2a-3a). On January 11, 1994, the Second Circuit panel granted rehearing on the trigger of coverage issue only. (88a-89a). Various parties, including dozens of *amici*, submitted briefs in connection with the rehearing. (RA1-4). On May 16, 1994, the Second Circuit issued its amended opinion, which was essentially the same as the September 1, 1993 decision, with some non-substantive editing. (3a-28a; Resp. Br. at 7). A judgment reversing and remanding the district court's decision, consistent with the amended opinion, was filed on the same date. (la-2a). However, "[n]o order as to *in banc* consideration [from the original September 29, 1993 petition] was issued when the amended judgment was entered." (Resp. Br. at 7; *see* la-2a). On June 21, 1994, the Second Circuit entered an Order that (1) acknowledged that a panel rehearing had already taken place with regard to the September 29, 1993 petition and (2) denied Grace's original and contemporaneous suggestion for a rehearing en banc. (RA5-6).

According to the Second Circuit docket sheet, on May 31, 1994, Grace delivered to the Second Circuit a "petition for rehearing en banc" from the May 16, 1994 Amended Decision. (RA1). The docket sheet indicates that there was a "problem" with the petition that had to be resolved by the Clerk's Office and that the petition was not deemed to be filed until June 13, 1994. (RA1-2). The delay presumably was

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[1] Throughout this reply brief, citations to the appendix to Grace's petition for certiorari appear as "__a"; citations to the opposition brief and appendix filed by Maryland appear as "Resp. Br. at __" and "Resp. App. __a", respectively; and citations to Grace's reply appendix appear as "RA __."

occasioned by Grace's characterization of its petition as a "petition for rehearing en banc" instead of a "petition for rehearing with a suggestion for rehearing en banc," which would have been the proper nomenclature under Fed. R. App. P. 35 and 40. On June 13, 1994, according to the Second Circuit docket sheet, the Second Circuit filed Grace's "petition for rehearing, petition for rehearing in banc." (RA2). Thereafter, at least five amicus curiae briefs were filed by the Second Circuit; each of them was docketed as a "brief in support of petition for rehearing/rehearing in banc." (RA2-4). On July 15, 1994, the Second Circuit denied both of Grace's requests for relief. (RA7-8). The Second Circuit's mandate issued on July 22, 1994. (RA4).

In light of the confusing history of this case and in an effort to avoid the very dispute raised by Maryland now, Grace's counsel, mindful of the filing deadlines imposed by Rule 13.4, spoke with the Clerk of the Second Circuit and the Deputy Clerk of this Court in late July 1994 concerning the filing deadlines applicable to Grace's petition for certiorari. Grace then sent letters to each of the clerks confirming that July 15, 1994 was the date the 90-day time period for filing a petition for certiorari would start running, based on the Second Circuit's treatment of Grace's May 31, 1994 petition. (RA9-11). Grace's petition for certiorari was filed on October 13, 1994, within ninety days of July 15, 1994.

GRACE'S PETITION FOR CERTIORARI WAS TIMELY FILED AS IT WAS FILED WITHIN NINETY DAYS OF THE DENIAL OF GRACE'S PETITION FOR REHEARING

Relying on Rule 13.4 of this Court, which provides that the "time for filing a petition for a writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered," Maryland argues alternatively that Grace's petition is out-of-time because (1) the petition that Grace filed on May

31, 1994 from the Second Circuit's May 16, 1994 Amended Opinion was not a proper petition for rehearing within the meaning of Rule 13.4, and/or (2) neither the Federal Rules of Appellate Procedure nor the Second Circuit's local rules permit the filing of "successive" petitions for rehearing. (Resp. Br. at 8-9). Neither argument is meritorious.

It is correct that the petition that Grace filed with the Second Circuit on May 31, 1994 seeking review of the Amended Opinion of May 16, 1994 was inappropriately styled as a "petition for rehearing en banc." The Federal Rules of Appellate Procedure do not provide for such a petition. *Missouri v. Jenkins*, 495 U. S. 33, 47 (1990); *see* Robert L. Stern *et al.*, *Supreme Court Practice*, § 6.3 at 286 n.20 (7th ed. 1993). However, the Clerk of the Second Circuit recharacterized and treated the petition as a "petition for rehearing containing a suggestion that the action be heard in banc." (RA7-8). That practice is neither unauthorized nor uncommon. *See Missouri v. Jenkins*, 495 U.S. at 47 & n.20; Advisory Comm. Notes on FED. R. APP. P. 35.[2]

Maryland's attempt to distinguish *Missouri v. Jenkins*, 495 U.S. 33, is unavailing. (Resp. Br. at 10 n.11). In that case, like this one, the petitioner had filed a "petition for rehearing en banc." *Id.* at 43. The Eighth Circuit denied the petition as labeled and issued its mandate in October 1988. *Id.* In January 1989, after the Supreme Court Clerk had rejected a petition for certiorari as being untimely filed, the Eighth Circuit recalled its mandate and issued a new order *nunc pro tunc*, recasting the "petition for rehearing en banc." as a "petition for rehearing with suggestion for rehearing en banc," *id.* at 44, reflecting its treatment of the filing as including both a petition for rehearing under Fed. R. App. P. 40 and a suggestion for rehearing en banc under Fed. R. App. P. 35.

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[2] "In practice, the suggestion of a party that a case be reheard in banc is frequently contained in a petition for rehearing, commonly styled 'petition for rehearing in banc.' Such a petition is in fact merely a petition for rehearing, with a suggestion that the case be reheard in banc."

The Supreme Court found that the "Court of Appeals interpreted and actually treated the [Petitioner's] papers as including a petition for rehearing before the panel," which the appellate court was authorized to do. *Id.* at 47-49. The Supreme Court acknowledged that the Eighth Circuit "knows more than we do about the meaning of its orders" and accepted the Eighth Circuit's denial of the "petition for rehearing en banc" as being a denial of a petition for rehearing for purposes of computing the filing time for the certiorari petition. *Id.* at 49-50.

Grace's case is even stronger, as the Second Circuit originally and explicitly denominated Grace's "petition for rehearing en banc" as both a petition for rehearing and a petition for rehearing en banc as reflected in the docket sheet entry for June 13, 1994, the filing date assigned by the court. (RA2). That act stayed issuance of the mandate. By Order of July 15, 1994, the Second Circuit again acknowledged both requests for relief and then denied them simultaneously. (RA7-8). The court's mandate subsequently issued on July 22, 1994. (RA4).

Maryland also argues that Grace could not file "successive petitions for rehearing." (Resp. Br. at 9 & n.9). However, the cases Maryland cites are distinguishable because, unlike this case, they did not involve successive petitions for rehearing where the second petition was filed only after the first one was granted, rebriefed, and an amended decision issued. Grace's September 29, 1993 petition addressed the Second Circuit's September 1, 1993 opinion; Grace's May 29, 1994 petition addressed the Second Circuit's amended decision of May 16, 1994, which issued after rehearing was granted and many principal and *amicus* briefs were filed. (RA2-4).

Accordingly, Grace's labeling of its May 31, 1994 petition notwithstanding, Grace's petition for certiorari should be considered timely filed. The Court should recognize the manner in which Grace's petition was treated by the Second Circuit, acknowledge Grace's timely and conscientious attempt to

abide by this Court's rules, as evidenced by its good faith communications with both this Court and the Second Circuit clerks' offices, and reject Maryland's attempt to avoid this Court's review of Grace's meritorious substantive arguments.

CONCLUSION

For all of the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ANTHONY J. MARCHETTA
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Counsel for Petitioner W.R. Grace & Co.-Conn.

Dated: November 21, 1994

APPENDIX

APPENDIX

Excerpts From Second Circuit Docket Entries

Proceedings include all events,
91-9322 Maryland Casualty v. W.R. Grace, et al.

5/16/94	Judgment of the district court is REVERSED and REMANDED by published signed opinion filed. (RJC) (ona)
5/16/94	Judgment filed. (ona)
5/31/94	Amicus Curiae Commercial Union motion to file brief as amicus curiae in support of petition and suggestion for rehearing in banc FILED (w/pfs). [524892-1] (to EG w/copy of brief) (twn)
5/31/94	Amicus Curiae Commercial Union brief received. Problem: motion pending to file brief. (twn)
5/31/94	Appellant W.R. Grace petition for rehearing received. Problem: OG will inquire with KB as to the filing of this petition. (twn)
5/31/94	Appellant W.R. Grace appendix of unreported decisions and authoritites [sic] to petition for rehearing in banc received. Problem: (see petition for rehearing received). (twn)
5/31/94	Amicus Curiae Asbestos Claims Mage motion to file brief as amicus curiae in support of petition for rehearing FILED (w/pfs). [528485-1] (ona)
5/31/94	New party added: New York State School Board Association as movants, seeking leave to participate as amicus curaie on appeal. (unv)
5/31/94	Movant NYS School Board motion to participate as amicus curiae, to file brief as amicus curiae FILED (w/pfs). [529073-2] (unv)
6/1/94	Appellant W.R. Grace motion to allow filing of appendix of unreported decisions and appendix A attached to the back of the petition for rehearing in banc FILED (w/pfs). [525601-1] (ono)

6/9/94	Order FILED GRANTING motion to file brief as amicus curiae [524892-1] by Amicus Curiae Commercial Union, endorsed on motion form dated 5/31/94. (ona)
6/9/94	Order FILED GRANTING motion to file brief as amicus curiae [528485-1] by Amicus Curiae Asbestos Claims Mage, endorsed on motion form dated 5/31/94. (ona)
6/9/94	Order FILED GRANTING motion to participate as amicus [529073-1] by Movant NYS School Board, endorsed on motion form dated 5/31/94. (unv)
6/10/94	Appellee Royal Indemnity Co. letter in response en banc review received. (cc:panel) (ona)
6/13/94	Order FILED GRANTING motion to allow [525601-1] by Appellant W.R. Grace, endorsed on motion form dated 6/1/94. (ona)
6/13/94	Appellant W.R. Grace Petition for rehearing, petition for rehearing in banc [530706-2] with proof of service filed. (ona)
6/13/94	Appellant W.R. Grace appendix of unreported decisions and authorities of the petition for rehearing en banc filed w/pfs. (ona)
6/13/94	Amicus Curiae Commercial Union brief in support of petition for rehearing/rehearing en banc filed with proof of service. (ona)
6/13/94	Amicus Curiae Asbestos Claims Mage, and Amicus Curiae NYS School Board brief in support of petition for rehearing/rehearing en banc filed with proof of service. (ona)
6/13/94	Amicus Curiae Commercial Union brief in support of petition for rehearing/rehearing en banc filed with proof of service. (ona)

6/15/94 Amicus Curiae Continental Casualty motion to intervene/become party FILED (w/pfs). [530482-1] (ona)

6/17/94 Letter dated June 16, 1994, submitted by Rosa E. Ross, Legal Asst., in compliance of request for additional 15 copies of W.R. Grace's Appendix of Unreported Decisions and Authorities in support of its petition for rehearing in banc, received (ltr in acoo) (ono)

6/21/94 Order FILED DENYING suggestion for rehearing in ba.. [532190-1] by Appellant W.R. Grace, [532194-1] and Appellee Royal Indemnity. It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that vote be taken thereon. (ona)

6/24/94 Amicus Curiae Central Wesleyan, and Curiae Anderson Memorial motion to file supporting brief W.R. Grace's petition for rehearing en banc FILED. (w/pfs). [534308-1] (ona)

6/24/94 Amicus Curiae Central Wesleyan, and Anderson Memorial brief in support of petition for rehearing/rehearing en banc received. (motion pending) (ona)

6/29/94 Order FILED GRANTING motion to intervene/become party [530482-1] by Amicus Curiae Continental Casualty, endorsed on motion form dated 6/15/94. (ona)

7/5/94 Letter dated June 28, 1994, submitted by Anthony J. Marchetta, Esq., regarding Grace's pending petition for rehearing in banc, which is still pending, received (cc:acco) (ono)

7/7/94	Order FILED GRANTING motion to file supporting papers [534308-1] by Amicus Curiae Central Wesleyan, Anderson Memorial, endorsed on motion form dated 6/24/94. (ona)
7/7/94	Amicus Curiae Central Wesleyan, Amicus Curiae Anderson Memorial brief in support of petition for rehearing/rehearing en banc filed with proof of service. (ona)
7/11/94	Non-dispositive stipulation for Pitney, hardin, Kipp & Szuch, 26 East 64th Street, New York to be substituted as attorney for W.R. Grace & Co. RECEIVED. [539395-1] (ona)
7/15/94	Order FILED DENYING petition for REHEARING [530706-1] by Appellant W.R. Grace, endorsed on motion dated 6/13/94., DENYING petition petition [sic] for rehearing in banc [530706-2} by Appellant W.R. Grace, endorsed on motion dated 6/13/94. (ona)
7/15/94	Motion and Amicus brief in support of petition returned to Amicus Curiae Texas Independent, Amicus Curiae Texas Governmental. (Order dated 7/15 DENIED petition for rehearing) (ona)
7/22/94	Judgment MANDATE ISSUED. (ond)
8/19/94	Mandate receipt returned from the district court. (ren)
10/17/94	Notice of filing petition for writ of certiorari for Appellant W.R. Grace dated 10/13/94 filed. Supreme Ct.#: 94-661 (cv73)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 91-9322
Filed June 21, 1994

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of June on thousand nine hundred and ninety-four.

MARYLAND CASUALTY COMPANY,

Plaintiff-Appellee,

—v.—

W.R. GRACE AND COMPANY

Defendant-Appellant.

CONTINENTAL CASUALTY COMPANY; AETNA CASUALTY & SURETY COMPANY and GENERAL INSURANCE COMPANY OF AMERICA;

Defendants,

ROYAL INDEMNITY COMPANY; AETNA CASUALTY AND SURETY COMPANY,

Defendants-Appellees.

Petitions for rehearing with suggestions for rehearing in banc having been filed herein by counsel for defendant-appellant W.R. GRACE & COMPANY, and defendant-appellee ROYAL INDEMNITY COMPANY, each on September 29, 1993, and the panel that heard the appeal having granted said petitions for rehearing in an order filed on January 11, 1994, and new briefs having been filed by same parties, and an amended opinion having issued May 16, 1994.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
GEORGE LANGE III, Clerk

By: /s/ CAROLYN CLARK CAMPBELL
Carolyn Clark Campbell
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 91-9322
Filed July 15, 1994

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of July on thousand nine hundred and ninety-four.

MARYLAND CASUALTY COMPANY,

Plaintiff-Appellee,

—v.—

W.R. GRACE AND COMPANY

Defendant-Appellant.

CONTINENTAL CASUALTY COMPANY; AETNA CASUALTY & SURETY COMPANY and GENERAL INSURANCE COMPANY OF AMERICA;

Defendants,

ROYAL INDEMNITY COMPANY; AETNA CASUALTY AND SURETY COMPANY,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be heard in banc having been filed herein by Appellant W.R. GRACE AND COMPANY on June 13, 1994

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

SO ORDERED:

FOR THE COURT,
GEORGE LANGE III, Clerk

By: /s/ KATHY BROUWER
Kathy Brouwer, Operations Mgr.

JUL 15 1994
(Date)

[LETTERHEAD OF PITNEY, HARDIN, KIPP & SZUCH]

Received stamp dated July 27, 1994
Office of the Clerk
Supreme Court, U.S.

July 26, 1994

VIA OVERNIGHT MAIL
Mr. Frank Larson
Chief Deputy Clerk
United States Supreme Court
Supreme Court Building
One First Street, N.E.
Washington, DC 20543

Re: Maryland Casualty Company v.
W.R. Grace & Co.-Conn., United States
Court of Appeals for the Second Circuit,
Docket No. 91-9322

Dear Mr. Larson:

This is to confirm our conversation today in which you advised that although we captioned a motion which we made on May 31, 1994, in the Second Circuit Court of Appeals on behalf of W.R. Grace & Co.-Conn. as a "Petition for Rehearing En Banc," the Second Circuit correctly re-characterized the motion as a petition for a panel hearing and a suggestion for rehearing en banc. Accordingly, July 15, 1994, the date on which the Second Circuit denied the motion, is the date from which we must calculate the 90-day period for filing a petition for certiorari with the United States Supreme Court.

We have enclosed a copy of the Second Circuit's July 15 Order. If, upon seeing this document, you have a different opinion about the nature of the order and, therefore, about the

date from which the 90-day filing period begins to run, would you please contact me as quickly as possible.

Thank you for clarifying this important matter.

Very truly yours,

/s/ CATHERINE E. TAMASIK
Catherine E. Tamasik

Handwritten Notation:

I have not changed my opinion—
/s/ FRANK LARSON
Frank Larson

enc.

[LETTERHEAD OF PITNEY, HARDIN, KIPP & SZUCH]

July 27, 1994

REVISED
VIA FAX
Ms. Carolyn Campbell
Chief Deputy Clerk
United States Court of Appeals
for the Second Circuit
Foley Square
New York, New York 10007

Re: Maryland Casualty Co. v. W.R. Grace & Co.-Conn., Docket No. 91-9322

Dear Ms. Campbell:

This is to confirm that the Second Circuit treated W.R. Grace & Co.-Conn's ("Grace") May 31, 1994 petition for rehearing en banc as a "petition for rehearing with a suggestion for rehearing en banc." The Chief Deputy Clerk of the United States Supreme Court, Mr. Frank Larson, similarly views Grace's May 31 petition as a petition for rehearing with a suggestion for rehearing en banc. Accordingly, Mr. Larson advised us that July 15, 1994, the date on which the Second Circuit denied Grace's petition, is the date from which we must calculate the 90-day filing period for a petition for certiorari to the Supreme Court.

I have enclosed a copy of the confirming letter that we sent to Mr. Larson along with a copy of the Second Circuit's July 15, 1994 order. Should your view of the proper characterization of Grace's May 31 petition change upon further reflection, please let us know immediately. Thank you for your advice in this matter.

Very truly yours,

CATHERINE E. TAMASIK

enc.
cc: A.J. Marchetta, Esq.
P.G. Barber, Esq.

Supreme Court, U.S.
FILED
NOV 25 1994
OFFICE OF THE CLERK

No. 94-661

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

W.R. Grace & Co.-Conn.,

Petitioner,

v.

Maryland Casualty Company, Royal Indemnity Company, Aetna Casualty & Surety Company and Continental Casualty Company,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Respondent Maryland Casualty Company's Motion to Strike Petitioner's Reply Brief

*Thomas W. Brunner
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(202) 429-7000

Attorneys for Respondent
Maryland Casualty Company

*Counsel of Record

November 23, 1994

No. 94-661

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

W.R. Grace & Co.-Conn.,

Petitioner,

v.

Maryland Casualty Company, Royal Indemnity Company
Aetna Casualty & Surety Company and
Continental Casualty Company,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

Respondent Maryland Casualty Company's Motion to Strike Petitioner's Reply Brief

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Respondent Maryland Casualty Company ("Maryland"), respectfully requests that this Court strike the Reply Brief submitted by Petitioner W.R. Grace & Co.-Conn. ("Grace") because it is premised entirely upon inappropriate *ex parte* communications with the Clerks of both the U.S. Court of Appeals for the Second Circuit and this Court which were clearly calculated to evade the 90-day time limit applicable to the filing of a petition for a writ of certiorari.

1. In its brief in opposition to Grace's certiorari petition, Maryland argues that Grace's petition is jurisdictionally defective because it was filed almost two months out-of-time. Maryland Brief in Opposition at 8-10. Under Rule 13.4 of this Court, an out-of-time certiorari petition must be dismissed for lack of jurisdiction.

2. As set forth in Maryland's brief in opposition, the Second Circuit panel that decided this case below entered its judgment on rehearing on May 16, 1994. Accordingly, Grace's petition for a writ of certiorari was due ninety days later -- on August 15, 1994. The petition was not filed, however, until October 13, 1994 -- almost two months out-of-time. Maryland Brief in Opposition at 8.

3. In its November 21, 1994 Reply Brief, Grace attempts to overcome this obvious jurisdictional defect by recharacterizing its June 13, 1994 request for *in banc* consideration as a second request for rehearing by the Second Circuit panel. In support of its position, Grace has included in its reply two letters that it submitted *ex parte* to the Clerk of this Court and the Clerk of the Second Circuit shortly before the August 15, 1994 deadline for filing its certiorari petition. Both letters memorialize *ex parte* communications made by Grace to the Court Clerks, which were clearly calculated to extend Grace's time to file a certiorari petition.

4. This Court should refuse to condone Grace's sharp practice. Grace's Reply Brief should be stricken because the *ex parte* communications upon which it relies go to the heart of a jurisdictional issue in the case, namely, the timeliness of Grace's petition for certiorari. Had Maryland known of these communications, it would have objected to Grace's attempt to obtain more time to file a certiorari petition by recharacterizing its pleading. Grace should not be permitted to rely upon self-serving, *ex parte* communications in these circumstances.

5. Further, Grace's *ex parte* communications with the Court Clerks constitute a clear attempt to circumvent this Court's rules regarding extensions of time for filing certiorari petitions. Under Rules 13.6 and 30.3 of this Court, an enlargement of time for the filing of a certiorari petition must be made by motion to the full Court. Grace failed to file any such motion, and instead engaged in *ex parte* communications to obtain an enlargement of time.

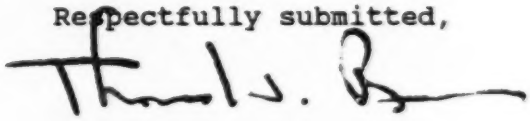
6. Grace's Reply Brief should also be stricken because it is founded upon a misrepresentation that finds no support in the Record. Grace has told this Court that its June 13, 1994 pleading was, from the beginning, a petition for rehearing with a suggestion for rehearing *in banc*. Grace Reply Brief at 3. It made the same representation to the Clerk of this Court. *Id.* at RA9. As set forth in Maryland's brief in opposition, however, Grace's pleading of June 13, 1994 was clearly a request for rehearing *in banc*. A

review of the pleading's contents as well as the subsequent representations of Grace's counsel confirm this. Maryland Brief in Opposition at 10, 5a.

7. Ironically, Grace asks this Court to "acknowledge Grace's timely and conscientious attempt to abide by this Court's rules, as evidenced by its good faith communications with both this Court and the Second Circuit clerks' offices . . . ." Grace Reply Brief at 5-6. Grace's so-called "good faith communications", however, were never served on Maryland nor, to Maryland's knowledge, any other party to the action.

For the reasons set forth above, Maryland respectfully requests that the Court strike Grace's Reply Brief.

Respectfully submitted,



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Petitioner W.R. Grace & Co.-Conn.'s Response to Maryland Casualty Company's Motion to Strike Petitioner's Reply Brief

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Petitioner W.R. Grace & Co.-Conn.'s Response to Maryland Casualty Company's Motion to Strike Petitioner's Reply Brief

W.R. Grace & Co.-Conn ("Grace") files this response to the motion brought by Respondent Maryland Casualty Company ("Maryland") to strike Grace's Reply Brief. Grace filed its reply brief pursuant to Rule 15.6 of this Court to address a jurisdictional argument first raised in the brief in opposition filed by Maryland, that Grace's petition for certiorari was filed out-of-time. Grace, in its reply brief, detailed the procedural history and the import of the two rehearing petitions that Grace

filed with the Second Circuit which demonstrate that its petition for certiorari was timely filed with this Court. In a final and desperate attempt to draw this Court's attention away from the merits of Grace's petition, Maryland again ignores and mischaracterizes the procedural history of this matter, focusing this time on routine correspondence between Grace and the Clerks of this Court and the Second Circuit which merely confirmed the Second Circuit's treatment and disposition of Grace's petitions for rehearing and the resulting deadline for filing its petition for certiorari with this Court.

Maryland's motion continues to misrepresent the procedural history of this matter that is reflected in the Second Circuit's docket entries included in the appendix to Grace's reply brief. (RA1-RA4). Contrary to Maryland's argument (Motion, pp. 2 & 3), Grace did not cause the Second Circuit Clerk to "recharacterize" Grace's petition for rehearing in order to enlarge the time in which to file a certiorari petition with this Court. The docket entries indicate that on June 13, 1994, the Second Circuit Clerk, *sua sponte*, filed Grace's pleading as a "petition for rehearing, petition for rehearing in banc." (RA2). On July 15, 1994, the Second Circuit denied both of Grace's requests for relief. (RA4). The letters by Grace's counsel to the Clerks of this Court and the Second Circuit dated July 26 and July 27, 1994, respectively (RA9-11), simply confirm the fact that the Second Circuit, *itself*, had earlier "re-characterized" Grace's petition,

that the relief sought in the petition had been denied on July 15, 1994, and that the 90-day period for filing a petition for certiorari would therefore begin to run from July 15, 1994. (*Id.*)

The letters merely confirm the status of the procedural posture of the case as reflected in the Second Circuit's docket entries. Contrary to Maryland's arguments, the correspondence with the Court Clerks was not a "sharp practice" designed to improperly "obtain an enlargement of time." (Motion, p. 3, ¶¶ 4 & 5). Grace's time for filing its petition for certiorari with this Court was not dictated by Grace's correspondence. Rather, that time deadline was triggered by the Second Circuit's Order of July 15, 1994. Had either of the Court Clerks interpreted the procedural history in the manner suggested by Maryland, then Grace would have filed its petition no later than August 15, 1994. The fact of the matter is that the docket entries accurately reflect the treatment and disposition of Grace's petition. Grace's correspondence with the Court Clerks did not impact either the Second Circuit's disposition of Grace's petition for rehearing or the timing in which to bring its certiorari petition before this Court. Maryland, therefore, was not prejudiced in any way by not receiving contemporaneous copies of Grace's confirming correspondence.

This Court should not countenance Maryland's procedural maneuvering to avoid or detract from a disposition of Grace's petition on the merits. For all the reasons set forth above, Grace

respectfully requests that this Court deny Maryland's motion to strike Grace's reply brief.

Respectfully submitted,

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